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DANIEL WEBSTER.

THE PRIVATE CORRESPONDENCE OF DANIEL WEBSTER. Edited by FLETCHER WEBSTER. 2 vols. 8vo. Boston: Little, Brown, & Co. 1857.

THE letters which are here collected and arranged with filial care by Mr. Fletcher Webster, present to us with great fulness the portrait of his illustrious father in his early life, and in a very pleasing light. They contain abundant evidence of the warm personal feelings and attachments, of the modesty, the diligence, and the grace which marked the beginning of a career destined to be so eminent.

The volumes open with the autobiography, which Mr. Webster wrote in 1828 for Mrs. Lee, and which has never before been given to the public, though many of the facts it contains, had of course been previously stated from various sources, and with greater or less accuracy.

Our concern with the book, is only so far as it enlightens us as to his career as a student and practitioner of law, and in this view there are scattered notes of much interest, some of which we shall cite. Mr. Webster once said that the fame which was dearest to him, and that he hoped and expected most from, was his fame as a lawyer. And it fortunately happens that enough is left in the collection of his works, and scattered in the reports of Wheaton and others, to enable posterity to form some estimate of his

great qualifications as a jurist. His reputation as an advocate, must chiefly live in the traditions of the bar of Massachusetts and New Hampshire. Even in this department, however, there remains the speech on Knapp's trial, which is, we suppose, a good specimen of his best manner.

From his letters, we get more fully the same general facts of his struggles with poverty, of his ardent pursuit of learning under all difficulties, and of his ultimate and still early triumph, with which our readers are already familiar. We find also frequent reference to his earnest desire to make the profession, in his own person, a liberal and enlightened one, with a constant regard to high principles, and his disgust at anything like pettifogging.

Of his course as a student, take this sample from the autobiography: —

"I was conscious of making a good stride onward, when I had obtained admission into Mr. Gore's office. It was a situation which offered to me the means of studying books, and men, and things. It was on the 20th of July, 1804, that I first made myself known to Mr. Gore; and although I remained in his office only till March following, and that with considerable intervening absences, I made, as I think, some respectable progress. In August the Supreme Court sat. I attended it constantly, and reported every one of its decisions. I did the same in the Circuit Court of the United States. I kept a little journal at that time which still survives. It contains little beside a list of books read.

"In addition to books on the common and municipal law, I find I read Vattel, for the third time in my life, as is stated in the journal; Ward's Law of Nations, Lord Bacon's Elements, Puffendorf's Latin History of England, Gifford's Juvenal, Boswell's Tour to the Hebrides, Moore's Travels, and many other miscellaneous things. But my main study was the common law, and especially the parts of it which relates to special pleading. Whatever was in Viner, Bacon, and other books then usually studied on that part of the science, I paid my respects to. Among other things, I went through Saunders's Reports, the old folio edition, and abstracted and put into English, out of Latin and Norman French, the pleadings in all his reports. It was an edifying work. From that day to this, the forms and language of special pleas have been quite familiar to me. I believe I have my little abstract yet.

"I remember one day, as I was alone in the office, a man came in and asked for Mr. Gore. Mr. Gore was out, and he sat down to wait for him. He was dressed in plain gray clothes. I went on with my book, till he asked me what I was reading, and coming along up to the table, I held out my book, and he took it and looked at it. '*Roccus*,' said he, '*de navibus et naulo*; well, I read that book too when I was a boy;' and proceeded to talk not only about 'ships and freights,' but insurance, prize, and other matters of maritime law, in a manner 'to put me up to all I knew,' and a good deal more. The gray-coated stranger turned out to be Mr. Rufus King."

The well known story of the clerkship which was offered to and refused by Mr. Webster, at this period, is very

pleasantly told by himself in this sketch, and also in a letter, contemporaneous with the event, and confirming the later account. It seems that it was not the dawning consciousness of future greatness, on Mr. Webster's own mind, as the ordinary version has it, but the earnest persuasion of Mr. Gore that induced him to decline the honor and emolument of the clerkship.

The following sketches of Chief Justice Parsons, and Mr. Dexter, as they appeared at that time, have never been published till now; they are taken from Mr. Webster's journal referred to above, and which contains little else of interest: —

"SOME CHARACTERS AT THE BOSTON BAR, 1804.

Theophilus Parsons, Esq., is now about fifty-five years old, of rather large stature, and inclining a little to corpulency. His hair is brown, and his complexion not light. His face is not marked by any striking feature, if we except his eyes. His forehead is low, and his eyebrows prominent. He wears a blue coat and breeches, worsted hose, a brown wig, with a cocked hat. He has a penetrating eye of an indescribable color. When couched under a jetting eyebrow, it directs its beams into the face of a witness, he feels as if it looked into the inmost recesses of his soul. When Parsons intends to make a learned observation, his eyebrow sinks; when a smart one, for he is, and wishes to be thought, a wit, it rises. The characteristic endowments of his mind are strength and shrewdness. Strength, which enables him to support his cause; shrewdness, by which he is always ready to rebut the sallies of his adversary. His manner is steady, forcible, and perfectly perspicuous. He does not address the jury as a mechanical body, to be set in motion by mechanical means. He appeals to them as men, and as having minds capable of receiving the ideas in his own; of course, he never harangues. He is never stinted to say just so much on a point, and no more. He knows by the juror's countenance when he is convinced; and therefore never disgusts him by arguing that of which he is already sensible, and which he knows it impossible more fully to impress. A mind thus strong, direct, prompt, and vigorous is cultivated by habits of the most intense application. A great scholar in everything, in his profession he is peculiarly great. He is not content with shining on occasions, he will shine everywhere. As no cause is too great, none is too small for him. He knows the great benefit of understanding small circumstances. It is not enough for him that he has learned the leading points in a cause; he will know everything. His argument is, therefore, always consistent with itself, and its course so luminous that you are ready to wonder why any one should hesitate to follow him. Facts which are uncertain, he with so much art connects with others well proved, that you cannot get rid of the former, without disregarding the latter. He has no fondness for public life, and is satisfied with standing where he is, at the head of his profession.

Samuel Dexter, Esq., is about forty years old; a man of large and noble appearance. His complexion is dark, and his eyes dark, large, and prominent. In point of character, Dexter undoubtedly stands next to Parsons, at the Boston bar; and in the neighboring counties and States, I suppose he stands above him. He has a strong, generalizing, and capacious mind. He sees his subject in one view, and in that view single and alone

he presents it to the contemplation of his hearer. Unable to follow Parsons in minute technical distinctions, Parsons is unable to follow him in the occasional vaultings and boundings of his mind. Unlike Parsons too, he cannot be great on little occasions. Unlike him, Parsons cannot reject every little consideration on great occasions. Parsons begins with common maxims, and his course to the particular subject, and the particular conclusion brightens and shines more and more clearly to its end. Dexter begins with the particular position which he intends to support. Darkness surrounds him. No one knows the path by which he arrived at his conclusion. Around him, however, is a circle of light when he opens his mouth. Like a conflagration seen at a distance, the evening mists may intervene between it and the eye of the observer, though the blaze ascend to the sky and cannot but be seen. Mr. Dexter is not a great student. Early attention has stored his mind with an immense fund of general principles, and he trusts his own powers in the application. He is generally opposed in causes to Parsons, and their contest is that of exalted minds. No fretting, no bickering, no personal asperity ever exists between them. Dexter is not rich. He lives upon his profession, which, as I was told by a pupil of his, affords him an income of near five thousand dollars. He once received fourteen hundred dollars for arguing a cause for the Spanish consul."

As time goes on, the letters allude less and less to law, and more and more to politics, and after the Dartmouth College cause, which evidently engaged his interest to a high degree, and is finally disposed of about 1820, there is not much of professional interest to be found. This is but natural, for communications on legal subjects, between lawyers, are more frequently by word of mouth, than by correspondence. But into the region of politics, of course we cannot follow the clue.

District Court of the United States. — District of Massachusetts. October, 1856.

THE R. B. FORBES.

Where a steam tow-boat was attached to a ship, whose sails were furled, the whole motive power being furnished by the tow-boat, it was *held*, that the whole moving body was to be considered as a steamer.

And in such a case, a collision having occurred with a schooner, which showed a light and kept her course, as she had a right to do, and it appearing that the lights on the ship and steamer were unskilfully placed, — *held*, that the steamer was liable for the damage.

It was not thought necessary to consider whether the ship would also be liable.

The facts are sufficiently stated in the opinion of the court.

Sprague, J. — This is a libel *in rem* against the steamer

R. B. Forbes, for damages caused by collision between the schooner Eliza, owned by the libellants, and the Romance of the Seas, a ship of about 1600 tons, towed by the steamer and lashed to the steamer's side. The steamer is a tow-boat of about 350 horse power. The schooner was lumber-laden, and was beating up Boston harbor on the evening of June 4, and the collision took place about ten o'clock, somewhere between Long Island Light and the "Castle."

I. The first question that arises is: — Whether the steamer is, in any event, liable?

It is contended, in the defence, that the steamer was the mere motive power; that she was the servant of the ship; that the whole control of both ship and steamer was in the owner of the ship; and therefore, that the ship, or her owners, are alone liable.

It is to be observed, in the first place, that the ship had no motive power of her own. Her sails were furled, and whatever motion she had was imparted to her by the steamer. The only separate motion the ship could have would be such lateral motion as might result from a change of her rudder. The ship and the steamer were so lashed together as to constitute one combined moving mass, whose momentum was the result of the steamer's motive power acting upon the aggregate bulk and weight of both ship and steamer. And such being the fact, I must conclude that the steamer had the control of the ship; and if there was negligence in the present collision, the steamer must be held liable.

The fact that the steamer was hired for the service of towage, can make no difference. This is a proceeding *in rem*, and not *in personam*. Generally speaking, in a proceeding *in rem*, no regard is had to the owners, as such. One chief benefit of such a proceeding is, that the law puts its hand on the offending *thing*, and without any regard to the matter of ownership, gives a remedy in favor of the injured party, against the vessel itself which has caused the damage.

It is not necessary, in this case, to decide whether the ship is also liable. That is another matter, and is not now before me for consideration.

It has been contended that the steamer was under the control of the officers, or the pilot, of the ship. But if such were the fact, it would not exonerate the steamer, nor affect her liability as to third persons. But the fact of

such control is not proved. The testimony of both the captain and mate of the steamer show that the orders, at and about the time of the collision, were given, chiefly, by the officers of the steamer. It did not appear that the master of the ship took any part in the direction at that time.

II. It is contended on the evidence, (1), That the fault was on the part of the schooner; or, (2), That the accident was inevitable.

As to the latter it must be a very extraordinary state of circumstances that could make the accident inevitable. The more intelligent witnesses, on both sides, testify that the night was slightly overcast, with stars appearing here and there, and that the schooner could be seen at a considerable distance, — far enough to have been avoided with due precaution. Several of the witnesses for the defence, it is true, say that the night was very dark. But if it was so dark that the schooner could not be seen, then it was not a night for such a large ship and so powerful a steamer to have left the wharf at all to go down the harbor, where vessels are very numerous, both outward and inward bound. In either view it is clearly not a case of inevitable accident.

Where, then, was the fault? So far as a look-out is concerned, I am satisfied that the ship and steamer had a good look-out both in numbers and character. And it is also testified that the schooner had a good look-out. The witnesses for the libellants also say that, when the ship and steamer were half a mile off, a light was taken from the schooner's binnacle and shown, in full view, until the collision was inevitable.

Now there is no imperative rule that a sailing vessel must show a light. Yet if a schooner in the night time, going where steamers may be expected to be met, fails to show a light, she ought not to recover for damages done by collision with a steamer, if the steamer keeps a good look-out and uses reasonable exertions to prevent a collision. It becomes therefore important to inquire whether a light was shown by the schooner. There were four persons on the deck of the schooner, and they all say that a light was shown in a conspicuous place above the deck load, and state all the attending circumstances. One or two persons also on board the ship say they saw a light just before the collision. But a large number of those on the look-out on board the ship and steamer say they did

not see any light, though they think they should have seen it, if one had been shown.

I am satisfied that a light was exhibited by the schooner, and that it ought to have been seen. But why was it not seen? Simply, in my judgment, because the lights on the ship and steamer were unskilfully placed. According to the testimony of the witnesses for the defence, large lights were placed in the rigging near the bows of the ship, directly in the line of vision of those on the look-out. Here was the fault. And this will account for another fact already alluded to, namely, that some of the witnesses, those on the look-out, stated that the night seemed to them very dark, and that they could see only a short distance ahead. There was a want of skill in the arrangement of the lights. Indeed, according to the defendants' own witnesses, it is pretty clear that the lights were so arranged as effectually to prevent a view directly ahead.

And here, I think, we may see the reason of the disagreement in the testimony about the position of the vessels when they came together. All the witnesses on board the ship and steamer say that when they first saw the schooner she was lying across the ship's bows; that she appeared to be just going in stays; and that the ship struck her bowsprit at a right angle with the ship's keel. All those on board the schooner say that she did not go in stays, but was close hauled on the wind, and that the vessels came together nearly "head on," or at an angle of only one or two points. From an inspection of the bowsprit, a part of which has been brought into court, I am satisfied that the first blow must have been made by a vessel approaching from nearly an opposite direction, and not at a right angle. And the sudden and near appearance of the schooner, as testified to by the witnesses for the defence, still farther confirms the belief that she was not seen until the projecting jib-boom of the ship had begun to press her round, and give her the appearance of going in stays under the ship's bow.

It has been contended, that, inasmuch as the schooner saw the steamer a mile off, that the schooner should have kept clear of the steamer. But it has been laid down as a rule in this court that a sailing vessel is to keep on her course, and it is the duty of the steamer to avoid her. The schooner had a right to believe and to act upon the belief that the steamer would diverge at the proper time and go clear of the schooner. If the schooner had di-

verged, and in consequence thereof had come in collision with the steamer, or ship, the schooner would have been in fault.

I am, therefore, of opinion that the schooner did show a light, and did not alter her course before the collision, and was not in fault, but that there was fault on the part of those in charge of the steamer and ship, and that the steamer is liable for the damages resulting from the collision. Decree for the libellants.

Charles E. Pike, for libellants.

H. F. Durant and *M. Dyer, Jr.*, for claimants.

November, 1856.

GEORGE P. BEARSE *v.* WM. ROPES ET AL.

Where goods are received on board a vessel, in good order, to be transported from one port to another, and no stress of weather is shown, the burden of proof is upon the ship-owner to establish a peril of the seas.

The facts are sufficiently stated in the opinion of the court.

Sprague, J. — This is a libel for freight of a quantity of hemp and iron from New York to Boston in the schooner Granite State. There is no question that the freight was earned. The defence is, that the hemp was damaged on the voyage by oil and sea water. Of the fact of such damage there is no doubt, and that it exceeded the amount of the freight; the only question is, whether the carrier ought to be held liable therefor. The master of the schooner signed a bill of lading in New York in the usual form, acknowledging the receipt of the goods on board in good order, and promising to deliver them in like good order to the consignees in Boston, danger of the seas only excepted. It is not contended that the deterioration of the hemp in this case arose from the nature or character of the article itself, that is, from any inherent quality or principle, but the damage arose entirely from its coming in contact with oil and sea water, in the hold of the vessel. The bill of lading contains a contract in writing. There being no doubt that the hemp was received on board in good order, and no suggestion of any inherent defect or

decay, the only question is, whether the damage was occasioned by the danger of the seas. It is insisted, indeed, on behalf of the carrier, that if he took the usual care and precautions, and conveyed these goods in the usual manner, he is not responsible for damage, whether arising from the danger of the seas or otherwise. To this I cannot accede. In order to exonerate himself from liability, he must bring himself within the exceptions of the bill of lading, and show that the damage arose from the danger of the seas. It appears that part of the hemp was stowed in the after-part of the vessel upon other cargo, and this received no injury. The hemp which suffered was in the forward part of the vessel. On the one hand it is insisted that the damage to this arose from the perils of the sea; on the other, that it was occasioned by improper stowage or some want of reasonable care or skill on the part of the carrier. The schooner was put up in New York for freight for Boston, and after filling up, she sailed during the latter part of June, and arrived in Boston early in July. Nothing unusual occurred on the passage; she met with no accident, no bad weather, and encountered no unusual wind or waves. The ship's company consisted of seven persons, and of these the testimony only of one seaman is produced. He says that in coming round the Cape the vessel careened, and the master for that reason took in sail, but he does not say to what extent, and the taking in sail is one of the ordinary occurrences of a sea voyage. And he says in express terms there was nothing extraordinary or unusual in the passage from New York. In such a passage in summer, with no bad weather and no bad sea, and with only so much wind as to cause them once to shorten sail, it would seem that such an article as hemp ought not to have suffered damage on board a seaworthy vessel, if properly cared for.

As to that part of the damage which was occasioned by oil, a considerable quantity of oil in forty gallon casks was in the hold of this vessel, but not within twenty feet of the hemp; about one hundred and twenty gallons leaked out, and with the water in the hold came in contact with the hemp. There is nothing whatever to show that this leakage was occasioned by danger of the seas. The cooper at Boston testified that the hoops were loose on two-thirds or three-fourths of the casks, and he is of opinion that they could not have been in good order when taken on board. From one of the casks all the oil had escaped except five

gallons. How this oil was stowed on board, and whether properly secured or not, there is absolutely no testimony, the evidence as to stowage being confined to the hemp. The decision of Judge Story in the case of the *Reeside*, 2 Sumner, 567, has a forcible application to this part of the case. Then as to the damage by water, it is suggested that this was occasioned by "blowing," as it is called, that is, by the water in the hold of the vessel being forced up through the seams of the ceiling, and thus thrown upon the hemp. It is not shown or contended that there was any unusual quantity of water in the vessel at any time, or any unusual motion. Indeed, the whole evidence is to the contrary, and it is said, that this blowing when the ceiling is not caulked is a common occurrence. Now it would seem that the carrier ought to take adequate measures to protect the cargo against a common and ordinary occurrence, which might and ought to have been foreseen. As to the stowage of the hemp, the evidence is not satisfactory. Of all the persons engaged in loading and unloading this vessel, the testimony of one only is produced, and he a common sailor, and he speaks only of what took place in New York. He says that he assisted in stowing, that the hemp forward was placed on a platform with dunnage under it. When asked his opinion whether it was properly stowed or not, he replied that he never stowed any better, but nowhere says that he had ever stowed hemp before, and on cross examination says that he never stowed any in the forward part of the vessel. Neither the mate or any other person engaged in unlading the vessel is produced as a witness. The only evidence of the stowage in Boston comes from one of the Port Wardens, who expressed the opinion that the hemp was properly stowed. But he testified that he was not called upon to make any examination until after a part of the cargo had been discharged, and that when he first went to the vessel a part of the damaged hemp was on the wharf, and of that which remained in the hold some appeared to have been moved, after the arrival of the vessel. Of course he could not know from his own inspection where it was during the passage, and must have relied for that fact upon the information of others, and they are not called as witnesses. He further says that he saw no indications of there having been any unusual quantity or uncommon motion of water in the vessel. On the whole, I am not satisfied that the damage to the hemp either from the oil

or the water was occasioned by the danger of the seas, within the true meaning of the bill of lading, and as the amount exceeds the sum claimed as freight, the libel must be dismissed with costs.

S. J. Thomas, for the libellants.

J. Codman, for the respondents.

Note to the cases of The Perkins, &c., in the last Number. We are informed that J. A. Abbott, of Boston, appeared for the claimants of The Acorn. His name was omitted by accident, in the report handed us for publication.

Superior Court of Connecticut. December, 1856.

RUEL H. BASSETT *v.* THE NORWICH & WORCESTER R. R. CO.

The servants of a railroad company are to be presumed to have assumed the risks incident to running the road with ordinary care and prudence, and run by competent and steady *employees*. But if the company fail to use proper precautions in the employment or in the supervision of their servants, they will be liable to other servants for damages occasioned by the neglect or default of servants chosen or continued without such due consideration.

This was an action on the case, demanding $6000 damages for an injury claimed to have been sustained by the plaintiff, whilst in the employ of the defendants as an engineer on a passenger train between Worcester and Norwich. The testimony showed that on the 25th day of December, 1852, while the train on which the plaintiff was engineer, was coming from Worcester to Norwich on its regular time, a through freight train, which the defendants had placed under the sole charge and control of one Benjamin Hoxie, and which was running from Norwich to Worcester, ran into the passenger train in a deep cut in the road near Plainfield, and that the engines and cars were broken up and several persons who were on board the passenger train injured. The testimony farther showed that the freight train was an irregular train running at an unusual hour, and not entitled to the road. That there was not any negligence on the part of the engineer or conductor of the down train which tended to produce the collision.

The plaintiff claimed that he received severe and permanent injuries in jumping from his engine, which had

destroyed his constitution, and rendered him incapable of performing the labor of a healthy, athletic man. He admitted that during the fifteen months thereafter in which he had labored for the defendants he had never mentioned the fact of his having been so injured to any officer or agent of the company, had performed his duty as an engineer, had not consulted a physician, but had taken various kinds of patent medicine that he saw advertised in the papers, and which he supposed might be beneficial in his case. He introduced testimony tending to show that Hoxie was not a competent engineer, or qualified to discharge the duties of a conductor, and had been at times addicted to the use of spirituous liquors, and he claimed that these facts were known to the officers of the company.

On the part of the defendants testimony was introduced tending to show that Hoxie was a man of more than ordinary intellect, and better educated than men in his position; that when he came into the employ of the defendants he was reputed to be a capable, careful and sober man; and that in the three years he had been in their employ, prior to this accident, he had shown himself in every respect worthy and competent. Also that Bassett had been all that time associated with Hoxie, and had had every opportunity to judge of his fitness to run this freight train and had made no complaint. They also offered testimony to prove that at the time of the collision, Bassett said to several persons, that he landed well in jumping from his engine, and had not suffered any injury; and further, that during the fifteen months he remained in their employ, he did not complain of any lameness, and performed labor as an engineer, which could only be performed by a healthy and very athletic man. It also appeared in evidence, that immediately after the injury, the plaintiff, in company with several *employees* of the defendants, walked from the place of the accident to Norwich, a distance of ten or twelve miles.

L. F. S. Foster and *J. Halsey*, (with whom was *J. F. Crocker*,) for the plaintiff, cited *Patterson* v. *Wallace*, 28 Eng. L. & Eq. 48; *Marshall* v. *Steward*, 33 Ib. 1; *Stevens* v. *Maine R. R. Co.* 13 Law Rep. 74; Story, Agency, 453; *Dixon* v. *Ranken*, 1 Am. R. R. Cas. 569, and cases cited; *Segur* v. *Kilingsley*, 22 Conn. 290.

J. T. Wait and *E. Perkins*, for defendants, relied on *Farwell* v. *Boston & Worcester R. R. Co.* 4 Met. 49; *Hayes*

v. *Western R. R. Corp.* 3 Cush. 370; *King* v. *Boston & Worcester R. R. Co.* 9 Cush. 112; *Albro* v. *Agawam C. Co.* 6 Cush. 75; *Coen* v. *S. U. R. R. Co.* 1 Selden, 492; *Brown* v. *Maxwell*, 6 Hill, 592; *Shields* v. *Yonge*, 15 Georgia, 349; *Honner* v. *Illinois Cen. R. R. Co.* 15 Ill. R. 550; *Cook* v. *Parham*, 24 Ala. 21.

Butler, J., charged the jury substantially as follows: — Should you be satisfied, upon a consideration of the testimony, that the plaintiff sustained the injury, which he claims to have sustained upon that occasion, you will then go farther and inquire, — whether the company were so guilty of negligence in committing the freight train, which caused the collision, to the care and management, or the *sole* care and management, of Benjamin Hoxie, that they are liable for that injury.

The company, like all common carriers, are liable for *any* injury received by passengers, in their persons, in consequence of their negligence, or the negligence of their servants. But it is claimed that they are not liable to one *employee*, or servant, for the negligence of another *employee*, or, at least, are not liable when they have used ordinary care in selecting and employing him.

The question whether a railroad corporation is liable to *employees* for negligence, and, if so, how far liable, has not received a judicial determination in this State. Several recent English and American decisions have been read by counsel, which, with an exception or two, seem to establish the doctrine that such corporations are not liable to their servants in such cases, — and, on the ground, that the servant assumes the risk of the employment, and is paid accordingly, — and also because he has had an opportunity to observe the conduct and capacity of his fellow servant, and may complain, or leave the service. But those cases did not turn on the questions raised here, viz., whether the company are liable to their other servants for *employing* an unskilful, or incompetent, or intemperate engineer; or if competent as an engineer merely, for committing to his *sole* care and conduct a through freight train.

It is doubtless true, as a legal presumption, and in fact, that engineers take the risk attending their business, into consideration, when they are engaged in the employment, and that higher wages are demanded and paid on that account; and that, therefore, a different rule should govern, as between them and the company, in relation to the negli-

gence of other *employees*, from that which governs as between the company and third persons. And it may be true, that, when the engineer is employed in immediate connection with another incompetent or negligent servant, whose capacity or conduct he may observe or control, he is bound to report to his employers, or leave the service, and that if he does neither, he may properly be held to have acquiesced in the continued employment of the negligent servant, or to have voluntarily assumed the additional risk attending such employment. But, in my judgment, neither a contemplation of the risk by the servant, nor an opportunity to observe the capacity and conduct of his fellow servant, should absolve the company from all duty or liability to their *employees*. Engineers and other servants should be holden to have contemplated and assumed the risks, and only the risks, incident to running a road managed with ordinary care and prudence, and run by other competent, steady *employees*, and should be further holden to have assumed the additional risk attending the employment and service of incompetent or intemperate persons, only in cases where they have had a fair and reasonable opportunity to observe or know, that they were running such additional risk, and to remove it by remonstrance, or avoid it by an abandonment of the service. And the company should be holden to the exercise of ordinary and reasonable care and prudence in the selection of their engineers and other agents, and in watching over them in the arrangement of their trains and putting the necessary force upon them, so that in business so dangerous as this, no unnecessary risk be incurred by their *employees*, by reason of unsafe arrangements, or want of watchfulness over those in their employ, or the employment of incompetent persons.

The first question for you, therefore, upon this part of the case, will be, whether the officers of the company exercised ordinary care and prudence in the original or continued employment of Hoxie, and in committing this through freight train to his sole management and control.

And here it will be important for you to look at the precise character of the negligence imputable to him. It does not appear from the circumstances attending the transaction, that he had not a competent knowledge of the nature of his engine, or competent skill in working it. His negligence consisted in leaving the station at Jewett City, when the afternoon way train was so nearly due, that he

had not time to reach the next station before it left. The expression used to the switch tender, as he was leaving, would seem to indicate that he thought he could reach the next station in time. But there was a down freight train upon the road, also, to which he may have referred, and his explanation, given at the time of the collision, as testified to by the witnesses on both sides, shows that he was attentive to the approach of the down freight train only, and had, as he stated, entirely forgotten the fact, that the down way passenger train was then above him, and nearly due. The precise negligence, then, consisted in a forgetfulness of the all-important fact that there was a down passenger train above him, then nearly due, which was entitled to the road, and which it was his duty to avoid. It was gross negligence. The fact that he usually ran his train up in the latter part of the night and early part of the day, and then met a different set of trains, and that he had been detained several hours by the failure of his engine, and the necessity of getting another, and that the trains which he usually met had all gone down, do not excuse it. A moment's reference to the time-card which he had, or should have had, in his possession, would have informed him what trains were upon the road, and when due at that station.

This question involves an inquiry in relation to the intelligence, prudence and habits of Hoxie, and you will look carefully at the testimony and say whether there was an original want of intelligence and prudence, or if not, whether his native intelligence and prudence had become deadened, or had been rendered obtuse by intemperance, or whether he was then intoxicated, and to which of these causes, or what cause, the negligent forgetfulness and inattention was attributable; and whether his original want of intelligence and prudence, or the loss of it, or his habits of intemperance, if either existed, or the cause, whatever it may have been, was such as the officers of the company, in the exercise of ordinary and reasonable care and prudence could have discovered; and such as should have prevented them, in the exercise of just care and prudence, from committing the freight train in question to his sole charge and conduct. If you find that the company did not exercise such care and prudence, in committing the train to the control of Hoxie, and the risk of the plaintiff was thereby increased, and he did not know it, and had not a reasonable opportunity to know, and so avoid it, the

company are liable, and your verdict, so far as this question is involved, should be for the plaintiff. But if you find that the company did use reasonable and ordinary care in relation to the employment of Hoxie and his charge of this train, or if they did not, that the plaintiff, with a full knowledge of the facts, acquiesced in his employment and assumed the additional risks incident to it, then the defendants are entitled to your verdict, whatever the injuries to the plaintiff may have been.

If you should be of opinion that the plaintiff was injured, in the manner and at the time he claims to have been, and that the company were guilty of negligence upon the principles I have stated, and that the verdict should be for the plaintiff, you will give him damages commensurate with the injuries, bodily and mental, which he sustained in consequence of the collision; and may also take into consideration the expenses which he has incurred in prosecuting his suit, beyond what are properly taxable in a bill of cost. But in looking at the nature and extent of the injury, it is incumbent upon you to distinguish between those which are the natural and necessary results of the accident, and those which are the results of the negligence of the plaintiff, or to which his negligence, since the accident, has essentially contributed. The plaintiff claims to have suffered a violent concussion of the chest, by coming in contact with the ground, — that it has continued weak, and that he now has such soreness and pain that he is kept awake nights; that his health is impaired, and that he is unable to earn the wages of an able bodied and healthy man. But he admits that he made no complaint at the time, and sought no relief from duty, — that he employed no physician, and merely took medicines which he saw advertised, expecting that the weakness would wear off. The defendants claim that it was their custom to favor their engineers when unwell, and especially if injured by accidents upon the road; and to give them every opportunity for recovery and restoration to health. That the plaintiff continued in their employ, as usual, without apparent or known injury; and their time-book shows that he so continued for fifteen months, not only making his full time, but twenty-eight and one half day's over work during that period. Now if the plaintiff, by the want of ordinary care and caution, and by unnecessary and continued and increased labor and exposure, and by his neglect to procure and pursue proper advice, has per-

mitted, or aided, a slight injury, which might have been cured, to become a serious and permanent one, the company are not to be held answerable for his present or prospective ill-health. He cannot recover for any injuries, or the consequences of any injury, which his own negligence has produced, or to which his own negligence has essentially contributed. It will be your duty, therefore, to look carefully at the testimony, and see how far the company should be subjected to damages for the ailments of which he at present complains.

The jury returned a verdict for the defendants.

United States Court of Claims.

JOHN ERICSSON *v.* THE UNITED STATES.

THE opinion of the court was delivered by

SCARBURGH, J. — By an Act of Congress, approved March 3, 1839, it was made "the duty of the Secretary of the Navy, under the direction of the President, to make preparations for, and to commence, the construction of three steam vessels of war, on such models as shall be most approved, according to the best advices they can obtain, or to complete the construction of one such vessel of war, upon a model so approved, as in the opinion of the President shall be best for the public interest, and most conformable to the demands of the public service;" and to enable the department to carry into effect this requirement, an appropriation of three hundred thousand dollars, subject to certain restrictions, was made. 5 Stat. at L., ch. 95, § 2, p. 364.

By an Act of Congress, approved July 20th, A. D. 1840, a similar appropriation of the further sum of three hundred and forty thousand dollars was made, for the purpose of completing the two steam vessels, which had been commenced.

By an Act of Congress, approved March 3d, A. D. 1841, an appropriation of the further sum of four hundred thousand dollars was made, to be expended in building and equipping war steamers of medium size.

On the 11th day of September, A. D. 1841, the Secretary of the Navy, by a letter of that date, addressed to the

President of the Navy Board, directed the Board of Navy Commissioners to cause to be built two steam vessels of war; one on Captain Stockton's plan, not exceeding six hundred tons, and one on that of Lieut. Hunter, not to exceed three hundred tons. Afterwards, the Acting-Secretary of the Navy, by a letter dated the 22d day of September, A. D. 1841, addressed to Capt. R. F. Stockton, U. S. Navy, informed him of the direction which had been given to the Board of Navy Commissioners, and ordered him to superintend the building of the steamer of six hundred tons, under the direction of the Commandant of the Navy Yard at Philadelphia, making to him, from time to time, during the progress of the work, such suggestions as he, (Capt. Stockton,) might think proper.

Captain Stockton, in a letter addressed by him to the petitioner, dated October 2d, A. D. 1841, expressed a wish to see and converse with him on the subject of the construction of the steamship, the building of which he had received orders to superintend. An interview took place between them, and Captain Stockton, in a letter to the petitioner, dated the 8th day of October, A. D. 1841, requested the petitioner to make the drawings of a ship with the dimensions they had previously spoken of. In subsequent letters, marked in the printed document ("Exhibit A,") on file in this case, "No. 16," "No. 17," "No. 18," and "No. 19," Captain Stockton gave the petitioner further and more particular instructions in regard to the drawings which he desired him to make. The petitioner complied with the request of Captain Stockton in all respects, and, in conformity thereto, made the drawings and performed the services specified in "schedule A," to be found in the printed document above mentioned.

The ship, Princeton, was constructed according to these drawings, and the result was entirely satisfactory to Captain Stockton, and highly advantageous to the United States. Captain Stockton reported her to the Secretary of the Navy as "a 'full-rigged ship' of great speed and power, able to perform any service that can be expected from a ship of war." See "Schedule M" of "Exhibit A."

On the 14th day of March, A. D. 1844, the petitioner presented his claim ("Schedule A" of "Exhibit A") for compensation for his services, to the Secretary of the Navy, and on the 11th day of May, A. D. 1844, it was rejected, on the ground that Captain Stockton, in a letter to the Secretary of the Navy, had stated as follows: "In

regard to Captain Ericsson's bill, which was sent to me at the same time, I must say, that, with all my desire to serve him, I cannot approve his bill: it is in direct violation of our agreement as far as it is to be considered a legal claim upon the department." See "Schedule F" of "Exhibit A."

In a subsequent letter from Captain Stockton to the Secretary of the Navy, he further stated: "That it has given me great pleasure to acknowledge, upon all proper occasions, the services of Captain Ericsson's mechanical skill in carrying out my well intended efforts for the benefit of the country." . . . "I have invariably given him to understand, in the most distinct manner, whenever the subject was alluded to, that I had no authority from the government to employ him; and that if he received anything, that it must be altogether gratuitous on the part of the government; that considering the great opportunity that he, as an inventor, would have to introduce his patent to the world by the aid of the funds of the government, I did not think it proper for him to make a charge for their application to the Princeton; in all of which he has concurred, as far as I know, up to the time of the presentment of his extraordinary bill." See "BB" of "Exhibit A."

In a letter from Capt. Stockton to the petitioner, written in July, A. D. 1841, he says: "In making up the estimate for the cost of the ship, it will be necessary to consider what must be put down for the use of your patent right. It will be necessary, therefore, for you to write me a letter stating your views on that subject. As a great effort has been made to get a ship built for the experiment, I think you had better say to me in your letter, that your charge will hereafter be (if the experiment should prove successful) ———, but, as this is the first trial on so large a scale, I am at liberty to use the patents, and after the ship is tried, government may pay for their use in that ship whatever sum they may deem proper." In reply to this letter, the petitioner, in a letter to Captain Stockton, dated the 28th day of July, A. D. 1841, said: "I have duly received your communication on the subject of my patent right for the ship propeller and semi-cylindrical steam engine, in reply to which I beg to propose, that, in case these inventions should be applied to your intended steam frigate, all considerations relating to my charge for patent right be *deferred* until after the completion and trial of the said patent propeller and steam machinery. Should their suc-

cess be such as to induce government to continue the use of the patents for the navy, I submit I am entitled to some remuneration; but, considering the liberality that thus enables me to have the utility of the patents tested on a very large scale, and the advantages which cannot fail to be derived in consequence, I beg to state, that whenever the efficiency of the intended machinery of your steam frigate shall have been duly tested, I shall be satisfied with whatever sum you may please to recommend, or the government see fit to pay for the patent right." See "No. 12" and "No. 13" of "Exhibit A."

In a letter from Captain Stockton to the Secretary of the Navy, dated February 7th, A. D. 1853, he refers to his letter of May 20th, A. D. 1844, and, amongst other things, says: "In that letter I stated the nature of Captain Ericsson's services, and the extent of the department's obligation to him, and admitted his claim to such compensation from the government as, under the circumstances, he may be entitled to.

"Time and reflection have not diminished, but rather increased my estimate of the nature of Captain Ericsson's services, and I have now the honor to reiterate my former opinion, and further to say, that the government should make him a fair and reasonable compensation for his time and expenses, while engaged in superintending the construction of the Princeton's machinery," &c., &c.

The services rendered by the petitioner were reasonably worth the amount charged by him, to wit, the sum of fifteen thousand and eighty dollars. See the deposition of Charles W. Copeland.

The question now presented for our consideration is, whether, under these circumstances, the petitioner is entitled to relief. He has shown that it had been determined by the proper authority, in pursuance of law, to build the steamer Princeton, and that to effect that object on the plan proposed, and on which she was in fact constructed, the very services rendered by the petitioner, to be performed either by him or some other person, were indispensable. It is insisted, however, that the services of the petitioner were rendered gratuitously. If this be true, then the petitioner's claim cannot be sustained.

In support of the proposition, that the petitioner's services were rendered gratuitously, it is urged, (1), That he was not employed by any person duly authorized to employ him; and, (2), That the testimony of Capt. Stockton

is direct and positive that they were thus rendered. *Nemo præsumitur donare*, and this maxim applies with great force to a case like the present, where the object on which the bounty is to be bestowed, is a great and powerful government, in possession of abundant means for all its legitimate purposes.

That the determination to build the steamer Princeton, precisely on the plan on which she was built, was made by the proper authority, under an adequate appropriation, is not disputed, and is in fact indisputable. It is equally clear, that it was not expected that her construction could be effected without an outlay of money. In order to carry out the object contemplated, it was necessary to employ proper agents, and to invest them with the authority requisite for the purpose. Accordingly we find the Secretary of the Navy giving orders to Captain Stockton to superintend the building of the steamer under the direction of the Commandant of the Navy Yard at Philadelphia, and to make to him, from time to time, during the progress of the work, such suggestions as he might think proper. If, then, this order was obeyed, she was lawfully built, and everything done in connection with her construction was lawfully done.

That the petitioner rendered the services, for which he claims compensation, is undisputed. But it is insisted that Captain Stockton had no authority to make such a request so as to entitle the petitioner to compensation, except under the direction of the Commandant of the Navy Yard at Philadelphia. If this be true, and Captain Stockton made the request without the direction of the Commandant of the Navy Yard at Philadelphia, he was guilty of a violation of duty. And, moreover, if this direction was essential to the validity of such a request, then it was also essential to authorize Captain Stockton to accept the services of the petitioner, though tendered to him gratuitously. But it is to be presumed that Captain Stockton, in all that he did, acted in the line of his duty, and not in violation of it. No complaint has ever been made against him by the government, whose agent he was, but, on the contrary, the payment of the petitioner's claim was made, by the very authority under which Captain Stockton acted, to depend upon his report. It must be intended, therefore, that, in making the request on which the petitioner's services were rendered, he acted by proper authority. If the direction of the Commandant of

the Navy Yard at Philadelphia were necessary, it will be presumed. The Secretary of the Navy himself, in rejecting the petitioner's claim, recognized Captain Stockton as the trusted and duly authorized agent of the government in the premises. There is, then, no room for question that what the petitioner did was lawfully done, and that his services were rendered at the request of an officer duly authorized to make it. He did not officiously intermeddle with the great public work, which was going on. It would, indeed, be a most offensive imputation upon the characters of the honorable men under whose superintendence and direction it was carried on and completed, even to suppose that he could have done so, if he had desired. The only point of inquiry, therefore, is, did the petitioner render his services gratuitously?

The letter from Captain Stockton to the Secretary of the Navy, of the 20th May, A. D. 1844, is explained by his letter to the same officer, of the 7th February, A. D. 1853. If we take the former according to its strict literal interpretation, Captain Stockton may be understood not only as having denied that he had any authority to employ the petitioner, but also as having asserted that the petitioner volunteered his services, and rendered them gratuitously. But he did not mean either the one or the other, as is apparent from the consideration that if he did, the two letters would be in conflict with each other. In his letter of the 7th February, A. D. 1853, he expressly says, that in his letter of the 20th May, A. D. 1844, he stated "the nature of Captain Ericsson's, and the extent of the department's obligation to him, and admitted his claim to such compensation from the government as, under the circumstances, he may be entitled to." He meant, therefore, in his letter of the 20th May, A. D. 1844, not only to state an obligation of some kind on the part of the Navy Department to the petitioner, but also to state the extent of that obligation, by admitting that he is entitled to a reasonable compensation for his services. But this is wholly inconsistent with the idea that those services were rendered gratuitously. The first letter, therefore, is not to be literally interpreted. It may not be improper here to add, that the letter of the 7th February, A. D. 1853, was obviously designed to be explanatory of the former letter; and to remove all doubt as to his meaning, he, in conclusion, says: "Time and reflection have not diminished, but rather increased my estimate of Captain Ericsson's services, — and I have now

the honor to reiterate my former opinion, and further to say, that the government should make him a fair and reasonable compensation for his time and expenses, while engaged in superintending the construction of the Princeton's machinery," &c., &c.

With the first letter thus explained, the whole case is relieved from difficulty. If the Secretary of the Navy, when he received that letter, had understood it according to this explanation, he would not have rejected the petitioner's claim. When Captain Stockton wrote the letter of the 20th May, A. D. 1844, he was manifestly under an impression that the plaintiff was asserting a special contract for specified services at fixed prices; and he meant to state not only that no *such* contract had been made, but that he had no authority to make it. It is to such a contract that the whole of the first letter refers. We can very well understand that the petitioner would gladly have availed himself of such an opportunity "to exhibit to the world the importance of his various patents," and that to secure it, he would have permitted his compensation to depend on the contingency of their success; but we do not suppose that Captain Stockton or any one else desired, that, if the result should be entirely successful, the United States should receive the benefit of the petitioner's services without compensation. Taking the two letters of Captain Stockton together, we have no difficulty in coming to the conclusion, that the understanding between the petitioner and Captain Stockton was, that the petitioner should be permitted "to exhibit to the world the importance of his various patents" in his own way and according to his own plans, and that he should receive just such compensation for his services as should be justified by the result. The petitioner agreed to accept a *quantum meruit*, dependent on the success of his labors.

The petitioner admits the receipt of eleven hundred and fifty dollars. He claims fifteen thousand and eighty dollars. We shall report to Congress a bill in his favor for the sum of thirteen thousand nine hundred and thirty dollars.

Notes of Cases in Vermont.*

Washington County. Supreme Court. November Term, 1856.

FARMERS MUTUAL INSURANCE COMPANY *v.* MARSHALL.

Principal and agent — Extent of authority — Evidence.

Held, that an insurance company appointing an agent and taking a bond from such agent with surety for the faithful discharge of his duty, from a date anterior to a policy of insurance effected by such agent before he received his appointment from the company, must be regarded as ratifying the acts of such agent on their behalf, from the date of his bond, it being recited in the bond that he is appointed agent from that date.

The authority of such agent of an insurance company is to be limited to such acts and representations, on behalf of the company, as come within the range of his employment, and as he would be expected to be allowed to make, in such employment, on behalf of the company, by a prudent man.

The company are not bound by any representations of their agent, which is so unreasonable as not to gain credit with discreet and prudent men, and this is to be judged by the jury.

A representation that the company had a large fund on hand and would not make any assessment during the continuance of the policy, and that the insurer would be entitled to a dividend at the end of the term, being in contradiction to the terms of the policy which provides for the payment of all assessments made by the directors, cannot be received to defeat the recovery on such assessments.

If the party have any redress in such case, it is by reforming the contract in a Court of Equity.

BRIGHAM *v.* DANA.

Partnership, how constituted — Settlement made under mistake.

This was an action of account, charging the defendant as co-partner and also as bailiff and receiver of plaintiff of goods and money, to be used and accounted for to their joint use, profit, and advantage. The defendant denied the relations out of which the account is claimed, and also plead *plene computavit*. Verdict and judgment to account was given against defendant, and the auditors made report. The facts are, that the parties, on the 16th October, 1849, entered into the following contract: —

* Continued from page 530.

"I, Stilman E. Dana of ——, agree that for the sum of $250 to be paid to my full satisfaction by G. N. Brigham, on or before the 25th of the present month, to go in the ship Argonaut to California for the purpose of gold-digging; and what I earn for the term," [agreed upon] "shall be equally divided between myself, or heirs, and the said G. N. Brigham, or heirs. The sum of $250 is to carry to and from San Francisco, or the place of destination. I agree further, to leave, in case of my decease, the amount taken out of any money or interest left by me, sufficient to pay the outfit; and the remainder is to be equally divided between us." It was further agreed, that if the defendant should accumulate no more than enough to pay the outfit, it should be so applied. The defendant received the money, went to California, and before September 1850, accumulated $577 in work at the mines, when he went into the "teaming and trading business" with one Bullard, in "furnishing miners, and other operatives about the mines, with implements for mining, food, clothing, and other necessaries."

In this business he continued till November 1851, when he had accumulated $1988.02 in all, and he then returned home, expending $200 on the journey, and $75 for clothing. He arrived sick and remained so for most of one year, during which time he expended $180 in his necessary support, and his time was worth $125, or would have been if well. He became sick soon after leaving Panama with the Isthmus fever.

After he came home he declined paying plaintiff any more than the sum advanced and interest, and $5 for his trouble, amounting to $340, saying the contract was not binding upon him. He represented he had not made much, and from all the plaintiff could learn he supposed he had made much less than he did in fact. The plaintiff took the money and receipted it as received "towards the California contract," and did not intend to receipt it in full, nor would he have taken it if he had supposed it was so intended by defendant. But defendant did intend it in full, but made no such express condition.

Held, that the money thus advanced was put at risk, and its return made dependent upon the result of the adventure, that it was, therefore, not in any sense a loan, or a cloak to cover usury, but a joint adventure in the nature of a general partnership in a particular business, and the defendant was liable to this action, and the plaintiff entitled to have judgment for his share of the avails of the adventure.

That it is not essential to a strict partnership that the partners should all be liable indefinitely for the losses of the concern *inter sese*. If they were to share the gains jointly and to share in the losses as they affected the concern, even to the extent of the capital advanced, as was the condition of the plaintiff under the present contract, he might fairly be regarded as a partner, as between himself and the defendant.

Nor is it essential to a partnership, that the partners should be

joint owners of the capital. This may be made to remain the property of the party making the advances, and the adventure still remain a partnership.

Held, *also*, that the transaction after defendant's return home did not amount to a binding settlement.

1st. Because the plaintiff was not made aware of the defendant's intention to make it a condition of the payment, that it should be accepted in full satisfaction.

2d. That even if that had been made known to plaintiff and assented to by him under a mistake of the facts, brought about by the misrepresentations or concealment of defendant, standing in such a fiduciary relation, it would not be binding upon plaintiff.

Langdon *v.* Lord.

Trespass — Justification under voidable warrant.

This was an action of trespass and false imprisonment. The defendant justified under a warrant of commitment against the plaintiff, issued by the chancellor of one of the judicial districts, for contempt in disobeying an injunction issued by the chancellor in a suit pending before him. The defendant took the application for the warrant from counsel who drew it up, and carried it to the chancellor who, upon examination of *ex parte* affidavits, adjudged the plaintiff, who was a party to the suit, to be in contempt, and issued his warrant of commitment without notice to plaintiff, and then took the warrant and delivered it to an official who committed plaintiff to jail. The Supreme Court, on habeas corpus, discharged plaintiff, adjudging the proceeding before the chancellor to be irregular and insufficient.

Held, that the Court of Chancery is to be regarded as a superior court of general jurisdiction, and that all reasonable intendments should be made in favor of the regularity of its judgments and proceedings, and that while they remain in force and are not set aside by them, those who act in obedience to them are justified by them, and cannot be regarded as trespassers.

That the want of notice to plaintiff not appearing upon the face of the warrant, it is a full justification of the officer and his assistants, and that the judgment holding plaintiff to be in contempt, although given without notice to him, is not absolutely void, but merely voidable upon application to the chancellor, and so the party and his servants are not trespassers for executing it by process.

State *v.* Abbey.

Indictment — Negativing exceptions in statute.

Held, that in the statute against bigamy the exception of persons divorced, and where husband or wife has been out of the State and

not known to be alive for seven years, being contained in a distinct section, although expressly referred to in the enacting clause, need not be negatived in the indictment.

Quære, whether the allegation in the indictment, that the party knew his former wife to be alive at the time of the second marriage, is not a sufficient negation of the last exception named above if it were essential to be negatived.

General Term of the Supreme Court at Montpelier. September, 1856.

EATON *v.* COOPER.

Evidence — Res judicata.

This was an action of trespass for taking plaintiff's property. The defence was, the defendants, as attorney and sheriff, attached the property on behalf of different creditors of one Kimball, and the effort was to show that the property having belonged to Kimball, and being sold upon certain claims against him by the sheriff, the plaintiff bid it in his own name but paid for it with Kimball's money. The creditors, or some of them on whose behalf the defendants made the attachments, had been allowed to enter and defend certain notes upon which the plaintiff had attached the same property, and had also brought a bill of equity to postpone his attachment, in both of which litigations the plaintiff had prevailed. The defendant now offered testimony to show that these same notes were fictitious and without consideration, this being the very ground upon which the bill in equity was attempted to be maintained. Kimball's declarations that the sale and purchase of the property was for his benefit, was received in the court below.

Held, that Kimball's declarations are competent evidence to show his fraudulent intention, but will not affect the plaintiff's rights, until brought home to him and his participation in the design shown by distinct proof.

Also, that these creditors who have once litigated the question of the validity of the notes are estopped to deny that fact, even for any collateral purpose, or giving character to the purchase at the sheriff's sale.

And that this question could only be made as to property sold upon creditor's claims who were not parties to the former litigation.

The plaintiff also offered to show that the defendants wasted and put to their own use a large portion of the property attached.

Held, that this testimony should have been received as tending to show that the defendants did not *bonâ fide* attach the property for the benefit of creditors, but abused a process on behalf of the creditors for their own purposes.

Chittenden County. Supreme Court. September Term. 1856.

MICHIGAN STATE BANK *v.* ESTATE OF HENRY LEAVENWORTH.

Letter of credit — Revocation by death — Bills where payable.

This is an action upon a letter of credit by which the intestate undertook for the acceptance and payment of such bills as should be drawn by A. P. & Co. of Detroit, Michigan, upon certain persons in Burlington, Vermont, and negotiated at plaintiff's bank in Detroit before a certain date.

After some $20,000 had been so drawn and accepted, the plaintiffs took the promisory note of certain other parties for the amount, payable on time, as collateral security for the amount due.

The remaining $8000 was drawn after the decease of Mr. Leavenworth, but within the time specified, and before his decease was known to drawers or the plaintiffs.

The bills were drawn payable in New York, and had all been accepted by the drawers named in the letter of credit without objection.

Held, that the acceptance of the notes of other parties as collateral security for the sum due, payable on time, is an implied undertaking to wait for the principal debt until the maturity of the collaterals, and is therefore a discharge of the intestate, he being known to the plaintiffs to be a mere surety.

Held, (one judge dissenting,) that the death of intestate is an effectual revocation of the letter of credit, and his estate cannot be charged with any bill drawn after his decease, although before that fact is known to the drawer or payer.

Held, also, (one judge dissenting,) that the place of payment of such bills not being specified in such letter of credit, but the attending circumstances and subsequent conduct of the parties showing that the money advanced on such bills being to be made in Detroit, at the plaintiffs' bank, it is consistent with the letter of credit, that the bills be made payable at the place where the plaintiffs advance the money, or if equally convenient to the acceptors, and more so to the payees, in the city of New York, where the acceptors may be supposed to realize their funds and where the plaintiffs most require funds, in the redemption of their bills. And that for the purpose of fixing the legal construction of the letter of credit upon a point where its terms are silent, the course of the business of the parties, and their conduct in transactions under the same letter may be shown. But in the absence of all proof it is the more general intendment of such a letter of credit that the bills should be made payable at the place of business of the drawees.

Windsor County. Supreme Court. November Term, 1856.

STATE *v.* A. B.

Evidence of prosecutrix in trial for rape.

This was an indictment for rape. Upon trial, on cross-examination of the prosecutrix, it was proposed to ask her, if she had not, before the time of the offence to which she testified against the respondent, had sexual intercourse with other men. The witness made no claim of privilege in regard to the question, but the attorney for the prosecution objected to the inquiry as incompetent.

Held, that such inquiry is competent, as an affirmative answer will tend to increase the improbability of the account given by the witness, and in that way to lessen her credit, and inasmuch as the party thus attempted to be discredited is the witness and has an opportunity to explain the transaction, the testimony is not liable to the objection of proving particular instances of misconduct by third persons, when the prosecutrix is not a witness, or without first giving her an opportunity of explanation.

Chittenden County. Supreme Court. December Term, 1856.

FLETCHER *v.* FLETCHER.

Bills and notes — Guardian's title — Administrator — Appeal.

The guardian of an insane person, who sells property of his ward and takes therefor a promissory note payable to the ward, or bearer, has such title to the note until the settlement of his guardianship account, that he may sustain an action thereon in his own name as bearer.

If, upon the settlement of such account, he surrender the note to the administrators of his ward who had deceased, they may also maintain an action in their own names as bearers, without describing themselves as administrators.

An appeal from the appointment of an administrator suspends the authority of such administrator until the appeal is disposed of.

In such case while the appeal is pending, the estate can only be administered by a special administrator, *pendente lite*.

SMALLEY *v.* SOROGAN.

Attorney's liability.

An attorney who settles the debt of his client, and accepts notes payable on time in collateral articles, and who, when his client declines paying the costs, saying he must get it out of the notes, sells them at a discount, both transactions being such as prudent

men would have accepted, is not liable to account for the discount made in converting such notes into money upon the general settlement of accounts with his client.

Quære, whether in such case the attorney is liable in any form of action.

Colchester v. Culver.

Equity — Presumption of complete conveyance by lapse of time, &c.

Where the registry of a deed of land wanted a seal, and the original was lost and the grantor had been many years dead, and the grantee had been in possession of a portion of the land described in the deed, and there was one lot in possession of a stranger claiming title from an independent source : —

Held, that a court of equity will require the heirs of the grantor to release their title to the lot in controversy to the grantee in such deed, neither the grantor nor his heirs having made any claim to the land after the date of such defective deed.

Robinson v. Cole.

Account may be brought after dissolution of partnership and need not be final.

It is not essential in order to maintain an action of account between partners, that all the debts of the firm be paid, and all their dues collected, and all the property in such shape that it can be easily divided, so as to bring the concern to an absolute close.

If the term of copartnership has expired, or a dissolution occur in any other mode, an action of account may be maintained whenever one partner obtains more than his just share of the moneys of the concern and refuses to make a just division. And this action will only bar such portion of the account as is thereby settled.

A subsequent action of account may be maintained, to recover any other sum, which either of the partners may unjustly detain from the others, and which was received subsequent to the former accounting.

Coon, Adm'r. v. Swan.

Usury — Money received on policy given to receive usurious promise.

The deceased applied to Swan for money to go to California, offering to give him a note for double the amount and interest, payable at a certain time. Swan had not the money, but borrowed it of A. B., giving him more than the legal interest, the other defendant signing as surety. It was also agreed that a policy upon the life of the deceased should be obtained in the name of the defendants for twice the amount of the money advanced, and that the premium and the extra interest paid, should be included in the note of the deceased given to the defendants, all which was done.

The deceased died in California and the defendants obtained the money upon the policy, and applied it in payment of the note executed to them by the deceased. This action is brought to recover the excess above the amount loaned and legal interest.

Held, the advance of the money was a loan, and all above the legal interest stipulated to be paid, was usury.

Held, the money obtained on the policy belonged to the deceased, and the excess above principal and legal interest, may be recovered back.

Powell *v.* Powell.

Divorce — Wilful desertion.

Where the husband petitions for divorce against the wife, under the statute allowing divorce "for three years wilful desertion," and proved that the wife refused to remove from the State of New York into this State to live near the husband's relatives, the husband having removed.

Held, that such absence from the husband is not to be regarded as "wilful desertion," unless it be proved that such excuse was a mere pretence on the part of the wife. That if the wife cannot live happily in any particular locality, her refusing to go there to live is not to be regarded as mere wilfulness.

Troy and Canada Telegraph Co. *v.* Cornell.

Corporation — Rights of against members.

It would seem from principle, and the decided cases, that where an association enter into stipulations in the form of a tripartite indenture, one party to furnish the capital, one to build a line of telegraph, and the other to convey the patent to be used by the line, and each of the parties own stock in the company, and it is farther agreed that an act of incorporation shall be obtained, and all rights growing out of the association shall vest in the corporation, and an act of incorporation is obtained, wherein it is provided that the corporation shall be invested with all rights and interests of the association, it would seem that such corporation can maintain an action against either of the parties to such association upon contracts existing before the act of incorporation, and even when the defendant was a member of the association in more than one part, so that no action at law could have been maintained upon the original articles.

Edmunds, Adm'r. *v.* Follet.

Deed — Construction — Strongest against grantor.

A mortgage deed describing lots 5, 6, 7, 8, 9, the westerly half of 10, 11, 12, 13, and 14, and stating that a stone store is erected

on 11, and 12, and a brick hotel on 13, and 14, the grantor owning all of said lots at the time of the conveyance, except the easterly half of 10, and the store and hotel being upon the easterly half of 11, 12, 13, and 14, should be construed as conveying all the lots except 10, notwithstanding the words are equally consistent with an extension of the terms "westerly half" to all the numbers which follow. Especially is this construction to be adopted where the store and hotel form an essential portion of the security.

Duiker *v.* Vermont Central Railroad Co.

Proof of telegraphic messages.

Telegraphic communications when relied on to establish contracts must be proved like other writings.

1st. By producing the originals. 2d. Where such originals are not in the possession of the party, the next best evidence, and in default of that, oral testimony of the contents of such communications.

The original, where the person to whom it is sent, takes the risk of the communication, is the message delivered to the operator.

But where the person sending the message takes the initiative in the transaction, the original is the message actually delivered at the end of the line.

A broker is not entitled to his commissions unless he complete the negotiation. But he may be entitled to pay for expense incurred in making preparation for such negotiation where an offer is withdrawn by the other party, after the broker has acted upon it under the assurance, that it should not be withdrawn till the transaction was closed.

Taylor *v.* Nichols.

Sheriff — How and when his official character can be questioned.

An action upon a receipt given the sheriff for property attached on mense process is *primâ facie* an action in which the creditor has an equitable interest, and it is not competent to defend the same by showing that the plaintiff was not properly inducted into the office of sheriff.

Quære, whether it is ever incumbent upon an officer who claims to maintain an action founded upon official character, to show more than substantial compliance with the requisites of the law in regard to his induction into office.

It would seem, that the official oath is not to be regarded as a substantial requisite in such cases. It being merely formal, the provisions of the constitution requiring every officer to take such oath is directory only, and the omission to do so will not affect the doings of such officer, even in suits where he is a party, and solely interested.

The official bond is matter of substance. But the officer is not to be deprived of his official protection for any accidental imperfection in such bond, where he has in good faith complied with what he regarded as the requirements of the law in that respect.

Preston *v.* Hutchinson.

Confederates in gaming jointly and severally liable to the loser.

By the statute of Vermont it is provided, that "if any person shall pay any money or other valuable thing lost at any game," &c., "he shall recover the full value thereof of the person to whom the same was paid, in an action of assumpsit."

In the present case it was proved that the plaintiff played with cards at a game called "brag" with the defendant and two other persons, it being a rule of the game, and so understood here, that each person played independently. It was afterwards discovered that the persons with whom plaintiff played had a secret understanding to share equally in whatever sum they could each win of him. In the course of the game they won about $275, but most of it was won and given over into the hands of Ferris, one of the number.

The plaintiff sued Ferris and took judgment for $195, the amount won by him, but he being unable to collect the judgment of Ferris, and learning of the confederacy, claimed to recover the whole amount paid to the three, of this defendant. He relied upon the judgment against Ferris as a bar, and also that he was not primarily liable for any thing more than the amount won by him.

Held, that the confederates were all liable as *tort feasors*, jointly and severally, and that whatever was won or paid to either, was to be regarded as won and paid to each and to all the others.

That such a transaction was not to be reduced to the analogy of a commercial partnership, but is rather to be regarded as a conspiracy to do an act prohibited by law, as among outlaws. And when we suppose the conspirators to depart from those honorary ties by which even the worst of associations are upheld among themselves, the analogy to the present transaction becomes more perfect.

That the contract among themselves is good to implicate the whole number in the acts of each other, but not a good ground of defence to them, and that consequently the judgment against Ferris without satisfaction is no bar to the recovery against this defendant.

Notes of Recent Cases in New Hampshire.

December Term, 1856. *Merrimack.*

State *v.* Rand.

Indictment for breaking and entering — Description of building — Trial of accessory before conviction of principal — Waiver of objections to jurors, and to conduct of parties.

Where the accessory is tried alone before conviction of the principal, acts and conduct of the principal immediately following the commission of the offence, and tending to show that he committed it, are competent evidence to prove the guilt of the principal.

The indictment charged that the principal broke and entered "a building called a bank, being the bank of the New Hampshire Savings Bank in Concord." It appeared on trial that the Merrimack County Bank owned the building in which the Savings Bank had their banking rooms; that the owners occupied a distinct part of the building, entered by a separate outer door; that the Savings Bank had the exclusive occupation of their rooms, as tenants to the owners, and entered by an outer door, which also lead to the other rooms in the building; the owners occupied no room that was entered by the last mentioned outer door; and no part of the building was occupied as a dwelling-house.

Held, that the rooms occupied by the Savings Bank were properly described in the indictment as their bank.

If the defendant or his counsel, before trial, know of an objection to one of the grand jury that found the indictment, and proceed to trial without making the objection, it is waived, and cannot be insisted on after verdict.

So if burglars' tools found on the principal are, during a recess of the court, while the cause is on trial, exhibited in presence of one of the jurors, and in presence of the defendant and his counsel, and no objection is made till after verdict, the objection will be regarded as waived.

Rome *v.* Addison.

Powers and liabilities of surveyors of highways.

Surveyors of highways and those acting under them, are not liable for incidental damages to land owners and others, in making or repairing the roads in their districts, if, in so doing, they act

with discretion and in a suitable and proper manner. *Otherwise*, if their acts are wanton, malicious or improper.

The defendant, a surveyor of highways, made a substantial bar of stone and gravel across the road within his district, near the eastern terminus of the same, by which, water, which in its natural flow would pass through his district, was thrown back into an adjoining district, and upon the premises of the plaintiff, situated in the latter district.

Held, that the surveyor was liable for the damages thus occasioned to the plaintiff.

Nichols *v.* Suncook Man. Company.

Deed — Boundary in a river — Adverse possession.

When a deed or grant of land is bounded upon a river not navigable, the boundary line extends to the centre of the stream, unless there is an express reservation to the contrary.

Adverse possession for twenty years of a tract of land upon a river not navigable, gives title to the thread of the stream.

Burnham & Pierce *v.* Dunklee.

Construction of special order, &c.

The defendant accepted an order drawn upon him by one Shaw in favor of the plaintiffs, of the following tenor: "Sir, please pay to Burnham & Pierce $370, on the lease of the Union House, after taking out the notes you hold against me, amounting to $300, and interest from Feb. 1, 1853, or about that time, if there should be so much, or to give up the lease to them after I may pay you the notes, then give them the lease for the purpose of securing them for the above amount due them as above mentioned."

Held, that the legal construction of the order was, first, for the defendant to pay himself out of the rents received on the lease, the $300 and interest on the same, and then to pay the balance of the rents to Burnham & Pierce, to the amount of $370, should they reach that sum, or assign the lease to them. That the acceptance bound the defendant to pay any excess of rents, however small, over the $300 and interest, until the payment should reach the sum of $370.

It appeared that the rents, during the continuance of the lease, would not amount to a sum sufficient to pay the notes and interest and the $370; that by an arrangement between the parties, Burnham & Pierce received the rents up to the last quarter and paid the $300 and interest, and the defendant retained the lease; that at the commencement of the last quarter the defendant directed the tenant to pay the rent to him, and Burnham & Pierce did not

receive the rent for that quarter. Upon a suit commenced against the defendant, upon the order after the expiration of the lease, —

Held, that he was liable for the amount of that quarter without any special demand therefor.

Fuller *v.* Bean.

Sale and delivery of goods.

An agreement was made at C., in this State, for the sale of certain goods then stored at that place, for seventy-five per cent. of the amount at which they should be appraised by a third person, to be paid half by the buyer's note, and half by the note of another person and cash. There was no direct evidence of any delivery of the goods at C., or that the terms of the agreement should not be at once complied with. The appraisal of the goods was made the next day, and the goods were taken and removed by an agent of the buyer. The payment by note and money, and a bill of the goods were made on a subsequent day at B. in Massachusetts.

It was *held*, that a sale is not complete so as to pass the property while anything remains to be done to ascertain the price, nor until the price is paid or secured, unless it may be necessarily inferred from the evidence, that the parties intended the property should pass at once and the price be fixed, or payment made at a future time. And in such a case it could not be assumed that the sale was complete at C., but the evidence relative to that question should be submitted to the jury.

Woods *v.* Davis.

Officers protected in the service of process — Arrest by collector of taxes on day of election.

A ministerial officer is protected in the service of process, unless he shall act maliciously, if the process be regular on its face, and does not disclose a want of jurisdiction, whenever there is jurisdiction of the subject matter; and trespass will not lie for an act done under process valid on its face, regularly issuing from a court of competent jurisdiction.

The arrest upon regular process of a person privileged from arrest, forms no exception to the general rule.

By the statute of New Hampshire, collectors of taxes, in executing the warrants to those directed for the collection of the taxes, are vested with the powers of constables in the service of process.

Trespass will not lie against a collector, who, by virtue of a legal warrant to him directed, arrests a legal voter on the day of election for the non-payment of his tax, although such voter be exempted by statute from arrest on such day.

Exemption from arrest, whether existing at common law or by statute, is a personal privilege, and may be waived by the party entitled to it.

December Term, 1856. *Hillsborough.*

Goodwin *v.* Union Screw Co.

Liability of a corporation to pay a quantum meruit for labor performed.

Where labor has been performed for a corporation, with the knowledge of the directors and general managers, the corporation will be liable to pay a *quantum meruit*, in the absence of any express contract under which the labor was performed.

Where one has the actual charge and management of the business of a corporation, with the knowledge of the directors, the corporation will be bound by his contracts made on account of the corporation, in the course of the business thus conducted by him, without other evidence of actual authority from the corporation.

Tebbets *v.* Hapgood.

Husband, liability for necessaries furnished wife.

The husband is bound to pay for necessaries furnished to the wife, unless he has made other suitable provision for her; and the burden of proof is on him to show that he has made such provision.

Parker *v.* M'Kean.

Pleading — Averment of time.

The averments in a plea are referred to the time of plea pleaded, and not to the time when the action was commenced.

Where in a suit commenced on the first day of October, 1855, the defendant was required to answer "on the first Tuesday of November next," and by the summons "on the fourth Tuesday of November next," and the defendant in pleading this variance in abatement at the November Term, 1855, after enrolling the writ and summons, averred that he was required by the writ to answer on the first Tuesdey of November next, and by the summons on the fourth Tuesday of November next, it was held on demurrer that the averment in the plea must be referred to the time when it was pleaded, and as it amounted to an averment, that by the writ and summons the defendant was required to answer on different days in November, 1856; the plea was bad.

Notes of Cases in New York.

Supreme Court. December, 1856.

PHELPS, EXECUTRIX, *v.* PHELPS.

Will — Conversion — Devise whether too remote — Gift.

A testator gave to his executors full power to convert all his real estate into money, but did not peremptorily direct this to be done. *Held*, in the absence of any request by the parties in interest, the court would not consider the property as equitably converted from real into personal estate.

The residuary clause of the will provided for a division of the property among all the testator's grand-children who should be living at the end of ten years after his decease, if A. and B. should so long survive.

Held, that this devise was valid under the law which confines the suspension of any such gift to the term of two lives in being; also, that the income of the real property within the State, and of the personal property everywhere, would belong, during the time of suspension, to the grand-children living when and as the income shall accrue, in equal shares. As to the income of real property situated in other States, a reference was ordered.

The testator provided for a fund to be set apart to secure a certain income to his wife for her life, and declared that if she died before the distribution of the residue, as above mentioned, the principal of the fund for her benefit should fall into such residue, but if she should survive that period, then said fund was at her death to be divided on a similar principle. *Held*, that as the distribution might not take place until after the end of two stated lives, the devise over was void, and the heirs at law would take this fund, subject to the payment of the annuity; and that the widow could not, under the statutes of New York, waive her rights in the fund, and allow it to go at once into the residue.

A sum was given towards the establishment of a college in Liberia, (which the testator said he understood it was in contemplation to found,) in case a certain other sum should be raised by other subscriptions. It was referred to the master to report what steps, if any, had been taken with this view, and what the prospect was of the sum being raised.

Some short time before his death, the testator addressed a letter to his son, inclosing the testator's promissory note for $100,000, which formed part of the letter itself, and desiring him to use the interest for the spread of the Gospel, during his (the son's) life,

and at or just before his death the principal to be invested for the benefit of two certain societies named. This paper was signed in the presence of two witnesses, but without the formalities required in the attestation of wills. *Held*, that this paper was not valid as a note, because without consideration, nor as a will, because not attested as such.

Superior Court of the City of New York. General Term, November, 1856.

Present: Oakley, Hoffman and Slosson, JJ.

Bartlett *v.* Carnley.

Sheriff — Attachment upon goods shipped.

Action against Sheriff Carnley for seizing and removing from the ship Alert, of which the plaintiff was master, certain goods, under an attachment against the shipper, the plaintiff having executed and delivered to the shipper a bill of lading for the said goods before the levy of the attachment. By reason of the seizure, the plaintiff was unable to deliver all the goods at San Francisco, according to the terms of the bill of lading.

Held, that the plaintiff was entitled, by way of damages, to the freight on the goods, according to the rate stipulated, and the difference between the value of the goods which the plaintiff got in New York after their return to him, and the amount paid for the deficiency to the indorsees of the bill of lading in San Francisco.

This decision is based on the principle of the English law, that the shipper who wishes to withdraw goods, after they have been laden and bills of lading delivered, must pay the freight and return the bills of lading, or fully indemnify the vessel or her owners, against the liability thereon. See *Tindall* v. *Taylor*, 28 L. & Eq. Rep. p. 210, Q. B. 1854. The attaching creditor, in this case, stands in the place of the shipper, under the English rule.

Common Pleas for the City and County of New York. General Term, November, 1856.

Blakeman *v.* Mackey.

Sale and warranty.

During the negotiation for the sale of oysters to the plaintiff, he said that if the oysters were not good, he did not want them, to which the defendant answered that he cut holes in the ice and took them out fresh. It appeared also that the plaintiff had on a former occasion purchased oysters of the defendant that did not suit him, and plaintiff said to the defendant that he did not want the lot

under consideration, if they were like the last, whereupon he was assured by the defendant that they were not like the last.

Held, that the representations of the defendant amounted to a warranty of the soundness of the oysters.

Liddle *v.* Mulligan.

Slander — Privileged communications.

The defendant was secretary of the Fulton Fire Insurance Company. The plaintiff had an insurance in that company. He had presented preliminary proofs, and claimed from the company full payment on the policy. An interview took place at the office of the said company, between the plaintiff, the defendant, and one Bowers, the Secretary of the Hartford Fire Insurance Company, against which the plaintiff held a claim on a policy issued on the same property which had been insured by the Fulton Company. At this interview the defendant said to the plaintiff that facts had come to their knowledge, which, if true, would go to show that he knew more about the origin of the fire than he admitted in the affidavit. The plaintiff rested his case on proof of the alleged slander, without offering further evidence in proof of malice.

Held, that what was said by the defendant was a privileged communication, and not slanderous.

Wilkinning by his Guardian *v.* Schmale.

Judgment — Guardian.

The defendant pleaded a previous adjudication as a bar to the present suit, and proved a former judgment in his favor in a suit for the same cause of action.

The plaintiff insisted that the former proceedings and judgment were void, for the reason that the appearance of the plaintiff was by a next friend, and not by a guardian as required by the statute.

Held, that the error in question, if it was one, could not affect the validity of the judgment, or render it void. It might be a ground for reversing the judgment for error in fact, and as the judgment was against the plaintiff, his remedy if he appeared erroneously by a next friend instead of a guardian, was by taking an appeal and getting the judgment reversed. As long as the judgment stood unreversed it was a bar to any other action for the same cause. *Maynard* v. *Downer,* 13 Wendell, 575; *Bloom* v. *Burdick*, 1 Hill, 130.

Notes of Cases in Massachusetts.

Supreme Judicial Court.—Counties of Plymouth, Bristol, Barnstable, and Dukes County. October Term, 1856.

Present: Shaw, C. J., Dewey, Metcalf, Bigelow, and Thomas, JJ.

Commonwealth *v.* Brady.

Police Court — Evidence.

By the Rev. St. c. 87, § 29, the towns of Salem, Lowell, Newburyport, and New Bedford, are each constituted a Judicial District, under the jurisdiction of a Police Court. *Held*, that the provision of § 33 of that chapter, that "all warrants issued by the said courts, or by any Justice of the Peace, in said Judicial District, in any criminal suit or prosecution, shall be returnable before the Police Court of the district," does not extend to warrants issued by Justices of the Peace in a town in which a Police Court is subsequently established by a statute which expressly defines its jurisdiction.

On the trial of an indictment for perjury, alleged to have been committed at the hearing of a complaint for setting a ship on fire, the District Attorney introduced evidence that a reward was offered for the detection of the incendiary, and contended that this offer of reward was the motive which induced the commission of the alleged perjury. *Held*, that evidence was then admissible for the defendant to show that he came on from New York to give his evidence at that trial reluctantly, and at the earnest solicitation of the insurers of the vessel.

W. H. L. Smith, for defendant.

J. H. Clifford, (Attorney General,) for Commonwealth.

Commonwealth *v.* Williams.

Husband and wife — Evidence.

On the trial of an indictment averring the stealing of the property of a husband from the person of his wife, the property is presumed to be the property of the husband, in the absence of proof that it was the property of the wife, notwithstanding the St. of 1855, c. 304, §§ 1, 2, providing that the property of any woman thereafter married should remain her separate property, and that the earnings of any married woman from her trade or business should be her own.

B. Sanford, for defendant.

J. H. Clifford, (Attorney General,) for Commonwealth.

COMMONWEALTH *v.* KIMBALL.

Nol. pros. — Indictment on St. 1855 *for keeping house of ill-fame, &c.*

A *nol. pros.* may be entered after the empanelling of the jury, even against the objection of the defendant, if he do not demand a verdict.

By St. 1855, c. 405, all buildings used as houses of ill-fame, resorted to for prostitution, lewdness or illegal gaming, or used for the illegal sale or keeping of intoxicating liquors, are declared to be common nuisances. *Held*, that an indictment on this statute, which averred that the defendant at a time named "did keep and maintain a certain building, to wit: a dwelling-house, used as a house of ill-fame, resorted to for prostitution, lewdness, and for illegal gaming, and used for the illegal sale and keeping of intoxicating liquors, said building so used as aforesaid being then and there a common nuisance to the great injury and common nuisance of all the peaceable citizens of said Commonwealth there residing," &c., was not bad for duplicity; and was sufficient, without alleging that the building was used by the defendant for the purposes enumerated; and did not require evidence of its being used for more than one of such purposes; or of its being an annoyance to all the community.

On the trial of an indictment on St. 1855, c. 405, the character of the women resorting to the house, and the character of the conversation of the women in the house, are admissible in evidence to show the character of the house.

E. L. Barney, for defendant.

J. H. Clifford, (Attorney General,) for Commonwealth.

JOHNSON *v.* THAXTER.

Insolvent debtors.

An assignee of an insolvent debtor cannot, in the absence of fraud, impeach collaterally a judgment against the debtor; but may sue out a writ of error to reverse the judgment.

J. A. Andrew, for demandant.

E. Wilkinson and *N. C. Berry*, for tenant.

HEWS *v.* HEWS.

Divorce.

The commitment of a husband to the House of Correction, on several successive sentences, at short intervals, will not prevent a decree of divorce on the ground of desertion, if the desertion commenced before the first commitment, and was not interrupted during the intervals.

Nye *v.* Inhabitants of Marion.

School district.

A vote of a town to set off N. (without adding "and his estate,") from School District No. 5 to School District No. 4, is invalid; and no action will lie by one of his children on St. 1845, c. 214, for his exclusion by the School Committee from the school in District No. 4.

S. Miller, Jr., for plaintiff.
B. Sanford, for defendants.

Roscoe *v.* Hale.

Statute of limitations.

The insertion of a debt in the schedule filed and sworn to by the debtor, under proceedings in insolvency, is not such an acknowledgment as will take the debt out of the statute of limitations. Nor is the payment by the assignee, of a dividend on said debt, such a partial payment as will defeat the statute.

J. Daggett, for defendant.
No appearance for plaintiff.

Barrows *v.* Rose.

Trustee process.

It is no ground of abatement on motion of the defendant, of a trustee process brought in the county in which the defendant resides, and duly served on him, that the trustee resides out of the Commonwealth.

E. H. Bennett, for plaintiff.
G. W. Dean, for defendant.

Holmes *v.* Green.

Domicil.

A citizen of Massachusetts, removing with his family in Rhode Island, and retaining no dwelling-place in Massachusetts, though intending at some future indefinite period of time to return, is not entitled to vote in Massachusetts.

C. J. Reed, for plaintiff.
J. S. Brayton, for defendant.

Morrison *v.* New Bedford Institute for Savings.

Trustee process.

A judgment rendered in a trustee process, charging one summoned as trustee, will protect him against a suit by the principal defendant to recover money paid by the trustee on the execution

issued on such judgment, although such principal defendant was not served with notice, and did not appear in the trustee process.

T. D. Robinson, for plaintiff.

T. M. Stetson, for defendant.

DUNNING MANUFACTURING CO. *v.* INHABITANTS OF PAWTUCKET.

Tax.

A corporation which is taxed, in the same bill, lawfully for its machinery, and unlawfully for its personal property, and pays both may maintain an action to recover back the amount of tax on the latter, the machinery being made by Rev. Sts. c. 7, § 10, clause 2, a distinct subject of taxation.

C. B. Farnsworth, for plaintiff.

C. J. Reed, for defendant.

CODDING *v.* INHABITANTS OF MANSFIELD.

Offer of reward.

On an offer of reward made by selectmen under St. 1840, c. 75, "to any person who will give information to the subscribers that will lead to the detection and conviction of the person who set fire to" a certain dwelling-house, a declaration which alleges that the plaintiff arrested such a person, and gave information to said selectmen, whereupon such proceedings were had that the prisoner was convicted, is insufficient.

C. J. Reed, for plaintiff.

E. H. Bennett, for defendants.

COMMONWEALTH *v.* WELSH.

SAME *v.* MITCHELL.

Prize-fighting.

The St. of 1849, c. 49, entitled "an act to prevent prize-fighting," provides in § 1 for the punishment of "every person who shall, by previous appointment or arrangement, meet another person and engage in a fight;" and in § 2, of "every person who shall be present at such fight, as an aid, second or surgeon, or who shall advise, encourage, or promote such fight."

An indictment on § 1 of this statute is sufficient, which alleges that the defendant, at a place and time named, by and in pursuance of a previous appointment and arrangement made to meet and engage in a fight with another person, to wit, with one J. S., did meet and engage in a fight with the said J. S."

An indictment on § 2, is sufficient, which alleges that the defendant, at a time and place named, "was present as aid and second, and did advise, encourage, and promote a fight, in which one A. B. did then and there, by previous appointment and arrangement so to meet and engage, meet and engage with one J. S."

On the trial of such indictments, it is not necessary to prove that the appointment was made in this Commonwealth, or that it was at a distinct time or place from the fight; and the appointment need not be proved by distinct evidence, but may be inferred from conduct of parties and other circumstances.

J. Brown, for defendant.

J. H. Clifford, (Attorney General,) for Commonwealth.

Norfolk County. October Term, 1856.

Present: The same Justices.

Commonwealth *v.* Jones.

Intoxicating liquors.

An indictment for being a common seller of intoxicating liquor at a town named in this Commonwealth, need not allege that the liquors sold were in the Commonwealth at the time of the sale.

G. A. Somerby, for defendant.

J. H. Clifford, (Attorney General,) for Commonwealth.

Treadwell *v.* Salisbury Manufacturing Co.

Equity jurisdiction — Trust — Manufacturing corporation.

Of a bill in equity brought by a trustee holding stock in a manufacturing corporation, to obtain the instructions of the court as to his duties in investing the trust fund in case they should sell all their property as they proposed to do, this court has no jurisdiction; because, until such sale, the trustee does not require the advice of the court. Nor can the court on such a bill restrain the corporation from selling all their property, because such an injunction is not properly incidental to the main purpose of the bill, nor necessary to dispose of the case; and, also, because a manufacturing corporation have a right to sell all their property, whenever, in the opinion of the directors, it is no longer for the interest of the corporation and their creditors to continue the business.

R. Fletcher and *J. J. Clarke*, for plaintiffs.

R. Choate, for defendants.

Vinal *v.* Inhabitants of Dorchester.

Way — Town damages.

A town is not liable for damages done to a traveller on a highway by a locomotive engine, run by a railroad corporation, on a track illegally laid over the highway.

W. Brigham, for plaintiff.

A. Churchill, for defendant.

CRAWSHAW *v.* CITY OF ROXBURY.

Offer of reward.

Independently of St. 1840, c. 75, the inhabitants of towns and city councils of cities are authorized to offer rewards for the apprehension of criminals, and that statute does not limit the amount of reward which may be so offered.

An offer of reward "for the apprehension and conviction of any person who shall set fire to any dwelling-house, barn, or building, within the city of Roxbury, with intent to destroy the same," is not void for ambiguity; and is binding on the city, though originally signed only by the mayor, and not ratified by the city till after the performance of the service for which the reward is claimed. And the person who gives information on which the criminal is arrested, and which has a tendency to produce ultimate conviction, and without which he could not have been convicted, unless he had confessed it, is entitled to the reward.

E. Worthington, for plaintiff.

W. Gaston, for defendant.

JENKINS *v.* QUINCY MUTUAL FIRE INSURANCE CO.

Fire insurance.

A policy of insurance issued by a mutual fire insurance company, was expressly made subject to their by-laws, one of which provided, that "unless the applicant for insurance shall make a true representation of the property on which he requests insurance, and of his title and interest therein, and also of all incumbrances and the amount and nature thereof, the policy shall be void." An applicant for insurance represented, in answer to questions, that the premises were owned by him and not incumbered, when in fact he was only a mortgagee. *Held*, that the policy was void.

J. W. May, for plaintiff.

J. J. Clarke and *G. White*, for defendants.

CHARLES RIVER R. R. CO. *v.* COUNTY COMMISSIONERS OF NORFOLK COUNTY.

Railroad damages.

The Rev. Sts. c. 39, § 58, having provided that "no application to the commissioners to estimate damages" for land or property taken for a railroad, shall "be sustained, unless made within three years from the time of taking the same," a mere filing of an application with the Clerk of the County Commissioners, without bringing it to the notice of the Commissioners, or any action of theirs thereon until the three years have elapsed, will not save the bar of the statute.

S. F. Plimpton, for petitioners.

E. Worthington, for respondents.

CLARK *v.* WARD.

Declaration.

Where a declaration is inserted in the writ, a new declaration cannot be filed on the return day without leave of court.

LANGMAID *v.* PUFFER.

Misnomer.

A writ in which the defendant was called *Charles* L. was actually served on *Chase* L. *Held*, that a judgment rendered against the defendant, after allowing *Charles* to be amended to *Chase*, was not therefore liable to be reversed on error.

J. J. Clarke, for plaintiff in error.

J. M. Keith, for defendant in error.

BATES *v.* KEMPTON.

Donatio causa mortis.

A promissory note of a third person may be the subject of a *donatio causa mortis*, and the donee may maintain an action thereon in the name of the donor's administrator, without previous notice to him, and without tendering him indemnity for costs. And the refusal of the court to order, at the request of said administrator, that the question of ownership between the administrator and the plaintiff should be settled before trial of the principal issue in the case, is no ground of exception by the defendant.

W. Colburn, for defendant.

P. P. Todd, for plaintiff.

Essex County. October Term, 1856.

Present: THE SAME JUSTICES.

COMMONWEALTH *v.* GARDNER.

Intoxicating liquors.

Under an indictment for being a common seller of intoxicating liquor, on a certain day named, and "on divers days since," the proof must be confined to acts done on the day specified, the further allegation being indefinite and uncertain.

J. W. Perry, for defendant.

J. H. Clifford, (Attorney General,) for Commonwealth.

COMMONWEALTH *v.* GREGORY.

Officer.

It is no ground for arresting judgment in a criminal prosecution for assault, that the officer who served the warrant on the defendant was the person assaulted and the complainant.

J. H. Robinson, for defendant.

J. H. Clifford, (Attorney General,) for Commonwealth.

PORTER *v.* SHEHAN.

Shell fish.

The right of all the inhabitants of the Commonwealth to take shell-fish below high water mark, authorizes them to take only living fish, and no more of the shells of dead fish, or of the mud in which they are imbedded, than must necessarily be removed in taking the living fish.

S. B. Ives, Jr., for plaintiff.

S. H. Phillips, for defendant.

M'FARLAND *v.* CHASE.

Tenant at will.

A conveyance of land by the three members of a partnership to a new firm, consisting of themselves and one other, transfers one undivided fourth of the premises to the new partner, as tenant in common with the old partners, and puts an end to an existing lease at will of the estate.

J. W. Perry, for plaintiffs.

S. H. Phillips, for defendants.

ESSEX COUNTY *v.* ILSLEY.

County commissioners.

St. 1835, c. 95, (imposing a penalty on counties, towns, and cities, the county commissioners, selectmen, or mayor and aldermen of which shall neglect to erect boards at the corners of roads, for one month after being notified,) being a penal statute, and the duty mentioned therein being a joint duty, a notice to one of the county commissioners, apart from the others, is not sufficient.

S. H. Phillips, for plaintiff in review.

N. W. Harmon, for defendant in review.

WOODBURY *v.* OBEAR, EXECUTOR.

Evidence — Expert — Will — Verdict.

On the trial of an appeal taken by a nephew and heir at law of the testator, from a decree of the Judge of the Probate allowing a

will, statements of the testator, that his nephew neglected him and attempted to poison him, are not admissible in evidence of the truth of the facts stated.

The refusal of the presiding judge, upon the trial of an issue of the sanity of a testator, to allow an expert, who had heard all the testimony, to be asked, "Suppose all the facts stated by the several witnesses to be true, was the testator laboring under an insane delusion, or was he of unsound mind?" is not a subject of exception.

Upon the trial of an issue of the validity of a will, a juror, after the charge, inquired of the presiding judge, if the instrument now produced as the last will were disallowed, who would take the property of the testator, there being evidence in the case that the testator had made an earlier will. But the judge replied that that was wholly immaterial to the issue to be determined by the jury, and should not affect the juror's mind; and refused to allow the juror to state a view which in his mind made it material. *Held*, that this ruling and refusal were no ground for a new trial.

A verdict, finding that a testator, at the time of executing an instrument offered for probate as a will, was of unsound mind, and was also under undue influence, is not inconsistent.

O. P. Lord and *S. B. Ives, Jr.*, for appellee.

S. H. Phillips, for appellant.

Intelligence and Miscellany.

THE TRIAL OF HUNTINGTON, AND THE LEGAL AND MEDICAL THEORY OF THE DEFENCE.

This case has occupied a large share of public attention, from the extraordinary number of forgeries committed by the defendant, and from the novel character of the defence, as applied to an accusation of this nature. We do not doubt the correctness of the verdict of guilty, but we cannot join in the abuse which a large portion of the press saw fit to heap upon the counsel for the defence, whose theory of the defendant's insanity was supported not only by considerable antecedent probability, but by the testimony of physicians of experience. We give, as a matter of curiosity, some of the testimony of the medical witnesses.

Dr. Willard Parker said: —

He, (Huntington), seemed to have a mind which operated very differently from the mass of minds; my conclusion was that he was insane, self-preservation is one of the laws of our nature, and he seemed to have

no sort of tendency or care with regard to it whatever; the all absorbing subject was the mere matter of making paper and carrying on paper operations in Wall Street (!) I should not regard this affliction as monomania, still the making of "paper" seemed to be the all absorbing matter with him, and if he were out he would make this paper again.

Cross-examined by Mr. NOYES.

Q. What do you mean by monomania, when you speak of it?

A. I should define it that a man's mind operates naturally right (so to speak) on all subjects excepting one subject, or one or two subjects; in reference to that subject, the moment it is touched it awakens a new train of thought, action, and manifestation, which actions are entirely at war with what is called the action of a sound mind; the opinion which I formed about his mind was entirely dependent on his statements and my own examination of his condition; the forms of insanity are infinite; the medical profession do not undertake to give a separate name to each peculiar development of insanity, that is admitted to be quite impossible by the most eminent medical men; in treating of some peculiar forms of monomania, those terms are made use of as expressive of this monomaniacal condition, — but though some forms are thus defined by name, I suppose there are a great number that have no name.

Mr. BRADY then read to Dr. PARKER the evidence introduced for the defence, and put to him the question, whether granting that the jury believed the evidence, he would consider Huntington sane or insane when the forgery in question was committed?

A. Supposing I knew nothing of the case now, it is possible that all you read to me might take place as the result of unparalleled recklessness, but knowing what I do of his case from personal examination, and also from testimony which I have heard, I should say that these actions were the actions of an unsound or insane man. No sane man would perform such actions in that way.

Q. If you think he was insane, what was the nature and character of that insanity!

A. It would be difficult to answer that question directly; I could not bring it under the head of monomania, but I should say it was monomania upon the subject of making paper for the simple purpose of obtaining means, not that he had any motive beyond that, that I could discover.

This is sufficiently indefinite and mystifying even for a medical expert, not generally the most precise and perspicuous of witnesses, but it may be it is the most exact a fair scientific man could make it.

In answer to Mr. NOYES, the doctor says: I think he is morally insane.

Q. In your judgment, upon what question is he morally insane?

A. He has no conception that he has committed any wrong; he does not appreciate it as a sound moral man would.

Q. You mean that he is incapable of appreciating the consequences of crime, — you think that he is incapable of appreciating that forgery is a crime?

A. I do not know that; I think he knows that forgery is a crime, but I think he does not appreciate the bearing of this crime upon his character; I think he does not appreciate the stigma connected with it; I think he knew he had committed a crime.

This hair-splitting as to the distinction between the prisoner's knowledge of right and wrong, and his conception of the influence of crime upon his

character and standing, is to us wholly unintelligible, and sets at defiance all legal theories of criminal responsibility heretofore established. It seems to us it would instantly set afloat the whole criminal system, and sum up its principle of responsibility in this concise and convenient dogma, viz.: to be a criminal, with a criminal's depravity, works full absolution of all crime! It may be a jury can understand this philosophy, and it may be that Dr. PARKER understands it, but this latter, with all respect for him, we beg to question. To proceed:

Q. You say he has no appreciation of his situation because of a diseased organization, — you mean mentally?

A. I mean the disease of the functions and organs of the brain.

Q. What particular organ is diseased?

A. The brain.

Q. In what portion do you refer to the organs according to the phrenologists that you mentioned?

A. I refer now, sir, to the effect that he has a trouble of vision, a steady pain in the head, and has sleepless nights. I rely upon these facts because he told me them; I am not prepared to say that his mental organization was such that he was irresistibly impelled to commit forgery.

This, it seems to us, concedes away the basis fact of the defence.

Q. Why could he not resist the tendency to commit forgery?

A. Because of his deseased physical, not mental organization.

Q. What was this disease?

A. I am not able to give you pathological anatomy of the case.

Q. Is that equivalent to saying you could not give a reason why he could not resist it?

A. He had certain manifestations and symptoms, (I am not speaking simply of what I saw,) viz.: pain in his head, congestion of the brain, *machinery*, in the head, (that he referred to also in our interview,) want of sleep, — putting those facts together, they lead us back to the inevitable conclusion that there is a diseased organization.

Mr. NOYES. — Please answer my question, what was the difficulty in his physical organization which prevented him from being able to resist the tendency to commit forgeries?

A. The precise nature of that difficulty I cannot name, as his pathological anatomy cannot be ascertained.

Q. Do you suppose he has conscience?

A. I think he has. I do not suppose it acts like other men's consciences, because he has done what other men would not do having conscience.

Q. Is it not, sir, because he has committed too many forgeries?

A. I do not believe it is. I do not know that Huntington is laboring under any insane delusion. I have not discovered that he is laboring under any delusion, whether insane or not, which compels him to commit forgery. I think he is not laboring under any delusion which forbids his committing forgery. I think he is not laboring under any delusion which prevents him from abstaining from committing forgery.

Q. Is he laboring under any hallucination, which compels him to commit forgery?

A. I know of nothing which forbids (?) it. I have not discovered that he is laboring under any irresistible impulse to commit any other offence. I have not discovered that his organization compels him to steal or lie.

Q. But you think he is laboring under an organization which leads him to commit forgery, — have the goodness to state what that organization is?

A. That I am unable to do; it is my opinion that it is merely physical; it is not mental.

Q. So then it is the physical organization when all his mental operations are entirely right?

A. No, sir; his mental operations are not right. They would be if his organization were; this tendency to forgery, I repeat, exists in his brain, and because of his diseased organization.

Q. It exists, as I understand you, with a knowledge on his part that he has committed forgery, and that it is a crime?

A. He does this knowing that it is a forgery, but how far he appreciates it as a crime, I am not prepared to say.

Q. Does this organization consist in any undue existence of what is called the faculty of acquisition?

A. I think it does not. There is no evidence at all that it consists in large acquisitiveness.

Q. What is the propensity, the indulgence of which in the physical organization leads him to commit any forgery?

A. I cannot name the organization that furnishes the propensity that leads him to commit any forgery; it is a love for forgery growing out of his diseased physical organization.

Q. In your opinion as a medical man, that exists in connection with a perfect mental understanding on his part that it is a forgery and wrong?

A. I think that is my opinion. I do not mean to say that this propensity is so strong that he cannot resist it. I am unable to say how far the power to resist the tendency to commit forgery is impaired by his physical organization, but I do think if he was set free he would do just as he had done before.

Mr. Noyes. — That is hardly an answer to my question, Doctor. To what extent do you suppose his power to resist temptation to commit forgery is impaired by the diseased physical organization of which you speak; is it partial or total?

A. I cannot say what motives you might bring to operate upon his mind. You might place before him motives that would lead him to avoid it, but if let go free he would do the same thing. I do not know whether his physical organization is such as to enable him to resist the temptation to steal or lie.

Dr. Gilman was next examined. He is a physician of thirty years' experience, — and a professor of medicine and medical jurisprudence. He examined Huntington at the Toombs, with a view to appreciate the state of his mind. His impression was that he was unsound and insane — that he had no moral sense. We quote him verbatim: —

"I suppose the brain is diseased in every case where moral insanity exists. A man who commits a murder may be intellectually aware that it is a crime, and yet be insane. A large amount of cunning is not incompatible with insanity, even when exhibited in connection with that insanity. As a general rule insane persons deny that they are insane, and they are very urgent to be let loose on the ground that they are not insane."

The witness here confirmed the statement of Peck and Pritchard, in which it is asserted that a man can be morally insane without intellectual hallucination. On cross-examinat on he stated: —

"His answers were never incoherent. I asked him how he came to do what he did, and if he did not know that it was illegal and wicked? He said he did not mean to do anything wrong, and that it was impossible to be convicted. All I could get out of him was that he knew it was wrong, as men say when they commit *usury*. All I mean to say is, that having

examined, I believe him to be insane. I pronounce him insane. A man manifests his insanity in a particular way. I suppose Huntington has that mixture of mental and moral insanity which is very often found. I believe he has a diseased brain. I don't believe he would be responsible if he rose up at this moment and drove a knife into you. If he should commit any offence whatever, I believe he would not be responsible. He would not know what he was doing if he did what I said above. The fact of his committing murder, and knowing that he would be hanged for it, would not affect the question of his insanity, neither would his commission of forgery or stealing. He might know that all this was wrong; delusion or hallucination has nothing to do with it. I believe that he has moral and mental insanity, with a little of intellectual insanity. Intellectual insanity is that he was reckless in the use of money in the way he committed the forgery, and his making no attempt to escape. In reference to this matter of forgery, I have my doubts as to whether he is insane. The question is, if he were placed in circumstances where he could commit violence, would he not have done so? I think he has general insanity. It is doubtful whether it is right to call it monomania. I differ from Dr PARKER with regard to this man's insanity being monomania or a general mania. Huntington had an irresistible tendency to commit crime. My opinion is, if a man is insane it would be unsafe to calculate on what he might or might not do. *The distinction made by the twelve judges in England of insanity, is all wrong in my opinion. I regard it as nonsense.*"

It will be remembered by the legal reader, that that opinion was, that "*to establish a defence on the ground of insanity, it must be clearly proved that at the time of committing the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong.*" (1 Car. & Kir 134; 8 Scott, N. R. 595.) The doctor makes quite free with this opinion of the English court, and we are not certain but he correctly characterizes it. It has always seemed to us a very uncertain and unsafe standard of criminal responsibility. The latest treatise on medical jurisprudence, (Wharton and Stillé.) divides that inquiry into the three heads of cases where the defendant is acting under an insane delusion as to circumstances, which, if true, would relieve the act from responsibility or where his reasoning powers are so depraved as to make the commission of the particular act the natural consequence of the delusion, — cases where the defendant is impelled by a morbid and uncontrollable impulse to commit the particular act; and, lastly, cases where the defendant is incapable of distinguishing right from wrong, in reference to the particular act.

The presiding judge substantially followed the ruling of the twelve judges: — "To constitute a complete defence, insanity if partial, as monomania, must be such in degree as to wholly deprive the accused of the guide of reason in regard to the act with which he is charged, and of the knowledge that he is doing wrong in committing it. If, though somewhat deranged, he is yet able to distinguish right from wrong in the particular case in which crime is imputed to him, and to know that he is doing wrong, the act is criminal in law, and he is liable to punishment."

It was insisted on the part of the defence that insanity, either special or general, may exist, and *the subject be wholly unable to control his actions while his intellect or knowing and reasoning powers suffer no notable lesion.* This proposition was ridiculed by the judge, but if the scientific mind of the country has adopted or shall adopt it, the courts must sooner or later follow the example.

COURT OF APPEALS IN NEW YORK. — A STEP IN THE RIGHT DIRECTION PROPOSED.

The court of last appeal in New York is composed of eight judges, of whom four are elected by the people directly for eight years, one going out of office every two years, and four are taken *every year* from the judges of the Supreme Court, having the shortest time to serve. This ingeniously absurd arrangement insures a change of one half of the court every year, and of five out of eight every second year, and has produced its natural fruit of delay, uncertainty, and dissatisfaction. In answer to inquiries addressed to them by a committee of the legislature, the judges have unanimously signed the following communication, which states the evils of the system so well and so calmly, that we will add no comment, except the hope that the constitution will be modified according to the suggestions of the judges, if a court still more permanent cannot be hoped for: —

Hon. Samuel A. Foot, *Chairman of the Committee on the Judiciary of the Assembly:*

Sir, — We have received your communication of the 16th instant, requesting from us an exposition of the inconveniences now experienced by the Court of Appeals in the administration of justice, and the causes thereof; and also a statement of such constitutional amendments as, in our opinion, will be likely to remedy the existing evils, and of such legislative provisions as would be necessary to make the remedy effectual.

The defects in the present organization of the Court, as developed by its history, are twofold. They relate in the first place to the impossibility, as now organized, of its disposing of the business properly brought before it; and secondly, to the difficulty of preserving a consistent and uniform course of decision.

No more serious evils than these could exist. A tardy administration of justice has little advantage over its total denial, and a fluctuating and uncertain rule, is scarcely to be preferred to absolute injustice.

During the now nearly ten years since the present court was created, its members, impelled as well by a desire to maintain the credit of the court, as by a just sense of their duty to the public, have most strenuously endeavored to prevent any accumulation of its business; but notwithstanding their utmost efforts, they find their calendar constantly increasing. It is obvious, that as the pending cases multiply, the temptation to appeal for more delay is increased, and consequently the existing evil must advance in an accelerated ratio.

This evil is not, in our judgment, irremediable, but grows in a great measure out of the constitution of the court.

In the first place, men cannot work together advantageously until they become acquainted with the character of each other's minds, their peculiarities of opinion, and the nature and extent of their respective acquirements. We have accordingly observed, that in the early part of each year, more differences of opinion exist than after we have had more experience of, and acquaintance with, each other. By the present system, however, when we are just beginning to know each other well enough to work together harmoniously, and avail ourselves of all the ability which each judge is found to possess, in special branches of the law, we are dissolved, and a new court is formed, the members of which must go through the same educational process, to no end but to make us all deeply conscious of the disadvantages under which we are called upon to perform the great task of preserving a uniform and satisfactory rule of justice, to control and protect the various and multiplied interests of the people of the State.

In the next place, after the members of a court have heard, and together considered a number of causes, they come to possess an amount of knowledge common to them all, which is continually increasing, and which would in a few years embrace more or less minutely, most of the ordinary topics of the law. When a court thus furnished with an amount of knowledge common to all its members, should come to hear the argument of a case, prolonged discussion would not be necessary upon such topics; and, as counsel would in most cases be aware of the general state of opinion in a permanent court, upon subjects which had been repeatedly discussed before the same persons, their labors would be greatly shortened. Under the present system, what a year ago might perhaps have been considered almost settled law, if it had then been presented for decision, may this year be wholly in doubt.

Again at the close of a year, the court, if not able to agree in the decision of a cause, as frequently happens, is compelled to order a re-argument, which must of necessity embrace the entire cause, while, if the case was to be reheard by the same judges, new argument would be requisite perhaps on but a single point; as this usually occurs in cases of difficulty and importance, a very considerable amount of time is thus necessarily lost.

But the evil arising from delay is not greater than that which results from the want of stability in the court.

Under our present organization, four judges are changed necessarily every year, and an additional one may be in each alternate year.

The court has hitherto very strictly governed itself by those previous decisions, which in theory ought to control it; yet it is quite plain that, upon any question not falling exactly within any previous decision, the rule ultimately adopted may vary, as the case may happen to come up in September of one year or in the following January. For instance, a case if argued in September may be decided by the opinion of five judges, who are to go out of the court at the end of the year, against the opinion of three judges who are to remain, and yet it may be that all the five judges who are to come in on the succeeding first of January would concur in opinion with the three dissenting judges. In such a case, of course, the decision will depend on the set of judges by which the cause is heard. Upon the same principle, when previous decisions come to be applied to subsequent cases, if the court does not approve of the grounds of the former decision, it will not be followed any further than the court considers itself strictly bound by its very terms.

A lawyer who is called upon to advise as to the propriety of an appeal, will, therefore, necessarily take into consideration what judges will probably compose the court when the case will be heard, and, to some extent, be governed in his advice, by the probabilities, favorable or unfavorable to his client, which he finds to exist.

In the decisions of a court of last resort, certainty and steadiness are elements of the first importance, so that lawyers and courts of original jurisdiction may be able to judge what it will do in future cases, from considering what it has done in past cases, depending upon similar questions.

No great degree of this desirable certainty can be obtained from a court which annually changes half its members; no amount of individual learning, candor, and ability, can resist the influence of such a system.

A court of last resort is responsible to the legal profession and to the public, that the body of the law as it administers it, shall as a whole, work out justice; that it shall at least proceed upon rules general in their nature, the tendency of which shall be to produce justice in individual cases, although from the necessary generality of those rules, that result cannot, in all cases, be obtained. An erroneous decision may at first prove of small

consequence; yet, when other decisions come to be made upon it, and it thus becomes framed (as it were) into the general system of the law, its evil consequences become both apparent and extended. It is to this test that all legal decisions are ultimately subjected, for, as to all of them, time and changing circumstances inevitably disclose whether they are founded upon principles which are just and sound.

This ultimate judgment, formed from seeing how the rule works when it comes to be applied under novel circumstances, is as unerring in its character, as is the general judgment of a whole people, as to its own well being.

The sense of this responsibility is one of the strongest motives, which operates both consciously and unconsciously upon persons in judicial office, to impel them to the exertion of their utmost ability and carefulness. This responsibility rests but lightly on those who remain in a court for a single year, and who are therefore in no way identified with its general success.

Should it fail, on the whole, to administer satisfactory justice, the discredit would chiefly fall upon those more permanently connected with it

Upon these fundamental grounds, we think the present organization of the court defective.

We have prepared the draft of an amendment to the constitution, in which we have adhered to the general plan of the present constitution, in respect to the election of judges by the people for definite terms, and to the gradual change in the members of the court, by the expiration of their respective terms of office biennially

The court, upon this plan, would consist of six judges, elected to serve only in the Court of Appeals.

The term of office to be twelve years, one to go out of office every two years. The present elected members of the court to continue in office until the expiration of their present terms. Under such a system it is obvious that the court would gain in point of steadiness, and we think it would also in point of efficiency. In such a court, the members might be together for a considerable part of the year, (if their compensation were put upon an adequate footing,) and proceed in the hearing and decision of cases cotemporaneously. The advantages of immediate consultation among the judges, in respect to a cause which has been argued, are very obvious, and are well exemplified in the practice of the Supreme Court of the United States It very much shortens the time necessary to the examination of a case, if the judges are able in the outset, to ascertain exactly what point they are in doubt upon, and what questions they all are agreed about. No time is so well suited to this end as the close of the argument.

We are satisfied that by such a court, proceeding in the manner spoken of, a much greater amount of business could be disposed of than the present court can decide; and that its ability to dispatch business would constantly increase as its members became thoroughly acquainted with each other's capacity and resources. We have likewise prepared an amendment extending the jurisdiction of the County Court, subject to the discretion of the legislature The County Court, a snow organized, is filled with efficient officers, to whom we think might be advantageously committed a large part of the smaller business which now clogs up and almost overwhelms the Supreme Court in most of the districts of the State.

In respect to the compensation of the judges, we think that it is plainly inadequate. So far as we know, no judge living in a town of moderate size, is able to live within its amount with all the economy practicable for those who have no time to bestow on their own private and domestic affairs.

We believe it to be poor economy in the State to fix the compensation of those who serve it in the most important public function, at a sum below the actual cost of their maintenance.

We do not feel inclined to say all that may be said upon this topic. But we are sure that when the office of judge, however honorable in its character, ceases to be a legitimate object of professional ambition for the advantages which it confers, the day is not distant when it will cease to be occupied by those who are fitted, either by their learning, their good sense, or their integrity, worthily to discharge its duties.

Hiram Denio,	L. F. Bowen,	Alex. S. Johnson,
A. G. Paige,	Geo. F. Comstock,	W. H. Shankland.
Samuel L. Selden,	John W. Brown,	

Notices of New Publications.

Principles of Government: or, Meditations in Exile. By William Smith O'Brien. With Notes to the American Edition. Boston: Patrick Donohoe, 23 Franklin Street. 1856. 12mo. pp. 460.

In this modest duodecimo of less than five hundred pages, Mr. Smith O'Brien gives to the world the results of four years reflections in exile, upon human conduct and government. It is a treatise neither wholly theoretical, nor written solely from his experience; but is rather an attempt to combine and set forth the results of his previous theories and opinions as they have been modified by eighteen years' experience as a member of the House of Commons, and finally altered, corrected or confirmed by his solitary musings in Australia. His book is not remarkable for its striking or original views, or for any great novelty, freshness or power in the manner in which they are presented. The subjects treated are very various, and occupy a wide field, including all the great social and political questions of the day, as well as those which have at other times perplexed political theorists and legislators. The best form of government, the true principle of taxation, the proper basis of representation, the duty of the State towards education, the true connection between colonies and the mother country, and the political rights and duties of women, are among the matters discussed in its pages.

After this imperfect catalogue, it is perhaps unnecessary to say, that the book contains no profound or exhausting examination of any subject. It makes no pretensions to anything of this sort. It is not ambitious or dictatorial, but quiet and unassuming in its tone and manner. The style is pure and easy, and the reasoning, though not profound, direct and clear, and in these respects the book reminds us of Paley.

Mr. O'Brien's opinions are by no means extreme. They are mildly conservative, and gently liberal, a republican graft upon a monarchist stock, and they are very far from what we in this country call dangerous. Indeed they can find but little sympathy, we imagine, with the large majority of the author's countrymen here.

The American Notes are signed M., and dated New York. They are written, if we may venture to *guess*, by Mr. Thomas F. Meagher, and were doubtless introduced for the benefit of Roman Catholic readers. They are not numerous, and they add but little to the value of the book. Those who are familiar with the great questions of the science of government, will find little pleasure or profit in Mr. O'Brien's work. But for those who have hardly thought at all upon the matters here treated of, it is a very useful and readable book.

MINNESOTA AND DACOTAH, in Letters descriptive of a Tour through the Northwest in the Autumn of 1856, with information relative to Public Lands, and a Table of Statistics By C. C. ANDREWS, Counsellor at Law, Editor of the Official Opinions of the Attorneys-General of the United States. Washington: Robert Farnham. 1857.

This unpretending volume will amply repay perusal by the professional and general reader. Its details are of great value, and its sound views will recommend themselves to all who read the book.

The author was formerly a member of our bar, and for the period of time he was among us, had obtained an excellent share of reputation and success, especially by his defence of Bain for manslaughter, and his services as junior to Mr. Dana in the defence of Dempster. In the latter case the Attorney-General complimented his clear and able opening.

We recommend to the legal reader the Chapter on the Minnesota Bar, as especially worthy his attention. The eyes of young men are naturally turned from the crowded bars of the older States to the new fields opening in our western countries. "My impression is," says Mr. Andrews, "that in point of skill and professional ability the Minnesota Bar is a little above the average of territorial bars. Here, as in the West generally, the practice is common for lawyers to mix with their profession considerable miscellaneous business, such as the buying and selling of land. The fees for professional services are liberal, being higher than in the East. Before an attorney can be admitted to practice, he must have an examination by or under the direction of one of the judges of the Supreme Court."

"The provisions of the Territorial Statutes are quite strict in their tendency to maintain upright practice. The opinion prevails almost universally in the East that a lawyer can do best in the West. In some respects he can; if he cannot do a good deal better, he is not compensated for going. I had the pleasure of a conversation last summer with one of the most eminent members of the New York bar, (Mr O'Conor,) on this very subject. It was his opinion that Western lawyers begin sooner to enjoy their reputation than the lawyers in the Eastern cities. This is true, and results from there being less competition in newer communities. 'A lawyer among us,' said Mr. O'Conor, 'seldom acquires eminence till he begins to turn gray;' nevertheless, there is no field so great and so certain in the long run in which one may become a really great lawyer as in some of our large commercial cities, whether of the East or the West. I will conclude by saying, that I regard Minnesota as a good field for an upright, industrious, and competent lawyer For those of an opposite class, I have never yet heard of a very promising field."

REPORTS OF CASES ARGUED AND DETERMINED IN THE COURT OF COMMON PLEAS FOR THE CITY AND COUNTY OF NEW YORK. With Notes, References, and an Index. By E. DELAFIELD SMITH, Counsellor at Law. Volume II. New York: Lewis & Blood. 1856. pp. 864.

The Court of Common Pleas of the City and County of New York is the oldest tribunal in that State, we believe, and it has always maintained a high character. It has an extensive jurisdiction of much importance, not only original, but also on appeal from the decisions of the Marine and District Courts, as to matters of law, and it has concurrent original jurisdiction with the other courts, to an unlimited extent, in causes both at law and in equity, in which parties are served with process within the county.

Many of the causes reported in this volume, of course, are founded upon special provisions of the code or on other statutes strictly local, and which would be of little interest out of New York; but there are many others, among which we may mention *Vermilya* v. *Austin*, p. 203, *Taggart* v. *Roosevelt*, p. 100, *Shulenburg* v. *Wessels*, p. 70, of more general interest, and all cases which are new or intricate, are discussed and decided with ability and research. Mr. Smith has maintained in this volume the character of an accomplished, diligent, and faithful editor, already acquired by his first volume, and we are glad to see that he promises us a third volume shortly. In view of the future, we may be allowed one or two criticisms, in matters chiefly of form. The volume is much too large, by reason whereof the binding of our copy has already began to break away from the book. There is too frequent use of italics; the emphatic parts of a sentence in a judge's opinion or a marginal note ought to be distinguishable by the professional reader without this aid. The marginal notes are very well written, but sometimes more extended than is necessary; the learned editor does not always content himself with giving in the note the substance of the decision of the court, but also annotates, as it seems to us, the preliminary reasonings which no doubt go to the foundation of the opinion, in the mind of the judge, but which form no part of the decision. This fulness of annotation undoubtedly has its advantages, among which is the production of a very copious index, but even here, if the heads are properly chosen, completeness may be reconciled with brevity. On the whole, the volume is a very good one, and very well edited.

REPORTS OF CASES ARGUED AND DETERMINED IN THE ENGLISH COURTS OF COMMON LAW. With Tables of the Cases and Principal Matters. Edited by Hon. GEORGE SHARSWOOD. Vol. LXXXV. Philadelphia: T. & J. W. Johnson & Co. 1856.

This volume of Messrs. Johnsons' excellent reprint, gives us in full the fifth volume of Ellis and Blackburn's Queen's Bench Reports, and with the advantage over the English edition of notes by Judge Sharswood, to say nothing of the diminution in price. The good effects of competition among reporters and publishers, in both countries, is shown by the fact that the cases here reported come down to Hilary Term, 1856.

PRINCIPLES OF THE LAW OF REAL PROPERTY, INTENDED AS A FIRST BOOK FOR THE USE OF STUDENTS IN CONVEYANCING. By JOSHUA WILLIAMS, Esq., of Lincoln's Inn, Barrister at Law. Second American from the fourth English Edition. With Notes and References to American Decisions, by WILLIAM HENRY RAWLE, Author of "A Treatise on Covenants for Title." Philadelphia: T. & J. W. Johnson & Co. 1857.

We are glad to see an annotated American reprint of this excellent little book. Intended as a practical introduction to conveyancing, it states clearly, simply, and with precision the present state of the law of real property. It has acquired a high reputation in England, and is the text book, in its branch, in the examination of candidates for honors and for the bar. It is hardly necessary to say that Mr. Rawle's notes are in excellent keeping with the work, and add greatly to its value.

Insolvents in Massachusetts.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Judge.
Adsit, Leonard	Lawrence,	Dec. 13, 1856.	Henry B. Fernald.
Borrman, Robert	Lawrence,	" 9,	Henry B. Fernald.
Bradbury, William	Chelsea,	" 23,	Isaac Ames.
Burton, Hazen J.	Boston,	" 24,	Isaac Ames.
Clark, Henry S. (*a*)	Pittsfield,	" 31,	Henry S. Briggs.
Clark, Levi	Plainfield,	" 9,	Horace I. Hodges.
Clark, William R. (*h*)	Lynn,	" 3,	Henry B. Fernald.
Coffin, Oliver C.	Lawrence,	" 27,	Henry B. Fernald.
Davis, Abel L. (*i*)	Westford,	" 23,	L. J. Fletcher
Downes, Azro B.	Charlestown	" 29,	Isaac Ames.
Eaton, Alonzo	Worcester,	" 12,	Alexander H. Bullock.
Furbush, Milo	Melrose,	" 13,	Isaac Ames.
French, Benjamin V.	Braintree,	" 20,	Francis Hilliard.
Ganson, Varnum	Lowell,	" 6,	L. J. Fletcher.
Gilbert, Stephen S. (*b*)	Boston,	" 29,	Isaac Ames.
Gooding, Amos W. B.	West Roxbury,	" 10,	Isaac Ames.
Gorham, Lewis C.	Roxbury,	" 17,	Francis Hilliard.
Hall, Lot	Ashfield,	" 15,	H. G. Newcomb.
Hassam, Frederic F.	Dorchester,	" 29,	Francis Hilliard.
Hayden, William	Boston,	" 12,	Isaac Ames.
Hooker, William D.	Dedham,	" 18,	Francis Hilliard.
Hooper, William R.	Worcester,	" 24,	Alexander H. Bullock.
How, James C.	Haverhill,	" 16,	Henry B. Fernald.
Howes, James	Dennis,	" 4,	Simeon N. Small.
Hoyt, Benjamin E.	Lawrence,	" 26,	Henry B. Fernald.
Hutchins Jacob N. (*i*)	Lowell,	" 23,	L. J. Fletcher.
Jordan, Charles Jordan, Eleazer (*c*) Jordan, Stephen R.	Boston,	" 31,	Isaac Ames.
Kingman, Luin F.	Medford,	" 6,	L. J. Fletcher.
Lincoln, George R. (*d*)	New Bedford,	" 1,	Joshua C. Stone.
Loud, Caleb	Northampton,	" 2,	Horace I. Hodges.
May, Oliver W. (*e*)	Worcester,	" 16,	Alexander H. Bullock.
McKaith, James	Abington,	" 1,	David Perkins.
Moses, Sanborn (*f*)	Lowell,	" 12,	L. J. Fletcher.
Moulton, Orson (*e*)	Worcester,	" 16,	Alexander H. Bullock.
Nelson, Asa	Georgetown,	" 13,	Henry B. Fernald.
Norris, Sawyer B.	North Bridgewater,	" 1,	David Perkins.
Noyes, Person (*f*)	Lowell,	" 12,	L. J. Fletcher.
Nye, William H. (*d*)	New Bedford,	" 1,	Joshua C. Stone.
Peverly, Robert H. (*g*)	Chelsea,	" 6,	Isaac Ames.
Piper, Nathaniel E.	Randolph,	" 6,	Francis Hilliard.
Saunders, Elisha B.	Natick,	" 10,	L. J. Fletcher.
Stevens, Joel (*a*)	Pittsfield,	" 31,	Henry S. Briggs.
Turner, Seth, jr. (*b*)	Boston,	" 29,	Isaac Ames.
Ulman, William	Boston,	" 24,	Isaac Ames.
Valpey, Geo. Augustus (*h*)	Lynn,	" 3,	Henry B. Fernald.
Wade, Eben H.	Boston,	" 27	Isaac Ames.
Wallace, Samuel, jr.	Cambridge,	" 11,	L. J. Fletcher.

(*a*) Clark & Stevens.
(*b*) Turner & Gilbert.
(*c*) C. & S. R. Jordan & Co.
(*d*) Partners, (supposed,) returned as one case.
(*e*) Moulton & May.
(*f*) Partners, returned as one case.
(*g*) Proceedings in this case stayed by order of court on petition of creditors, December 31.
(*h*) Clark & Valpey.
(*i*) Partners returned as one case.